IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

RECORD NOT PRINTED

No. [redacted] 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The above named petitioners* jointly pray that a writ

* Under date of December 8, 1967 petitioner LeFranc wrote to the Clerk of this Court stating in part, "I respectfully ask the Clerk to include me in the petition for certiorari by the other defendants. I expected an attorney in Atlanta to file this for me and I received a letter returning my papers. I now find that I must personally request the Court's help". LeFranc was represented in the Court below by undersigned counsel Messr's Markowitz and Glasser, but he

(Continued on following page)

of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in this case on October 13, 1967.

Opinions Below

The opinion of the Court of Appeals affirming the convictions of the petitioners, and the opinion of the District Court after remand on issues of electronic eavesdropping, are not yet reported; they are printed, respectively, in Appendices A and B hereto, *infra*.

Jurisdiction

The judgments of the Court of Appeals were entered on October 13, 1967 (Appendix C hereto, *infra*). The time for filing petitions for certiorari has been extended to and including December 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

(Continued from preceding page)

has not retained any of the undersigned counsel for this certiorari; some weeks ago he advised us that he had counsel in Atlanta, Georgia, for this purpose. He has also repeatedly told us, most recently on December 8, 1967, not to include him in this petition and that he would himself write to the Court requesting to be included. Some weeks ago LeFranc applied *pro se* for extension of time to petition for certiorari and Mr. Justice Harlan granted him until December 15, 1967. Owing to LeFranc's error in stating the date of the judgment to be reviewed, the December 15 extension date put LeFranc three days beyond the jurisdictionally permitted extension period. We (counsel) then *Sua Sponte* included LeFranc in the application for extension of time filed on behalf of the other petitioners, and all petitioners were then granted an extension to December 12, 1967. In connection with the last mentioned application, entry of appearance was filed, as required by the new Rules, by Mr. Glasser (counsel herein) for all petitioners including LeFranc. In view of that entry of appearance, *i.e.*, to insure that no duty of counsel is breached, we have included LeFranc's name as one of the petitioners in this joint printed petition, subject of course to any direction by the Court.

Questions Presented

Petitioners were convicted of narcotics conspiracy, this being the much-publicized "deep freeze" narcotics case in which two American Army officers allegedly shipped from France a deep freeze unit containing the largest amount of pure heroin ever captured by police in this country. In this narcotics case of unprecedented importance to the prosecutive and investigative personages involved, the questions presented include both the constitutionality of the Government's electronic surveillance and whether the petitioners have been accorded due process procedures (in both of the Courts below) to test out whether the Narcotics Agents have fully and truthfully disclosed their electronic eavesdropping activities relating to this case. Prior to trial the Government revealed that it intended to introduce evidence obtained by non-trespassory electronic bugging at the Waldorf-Astoria hotel in December 1965 and it represented that there had been no other electronic eavesdropping or wiretapping in this case. At a pre-trial hearing the Government's claim that the Waldorf-Astoria "bugging" was non-trespassory was sustained, the evidence was received at the trial, and the Government told the Jury in summation that "it was through these [bugged] conversations" that the Government had decisively built its case. The questions are:

1. Accepting *arguendo* the Government's contentions (and the findings below) as to the manner in which the Waldorf-Astoria bugging was done, was the resultant evidence constitutionally admissible under the *Pardo-Bollard* case (*infra*) on the theory that although the Government secretly "bugged" and recorded private conversation in a private hotel room, the method used involved no "trespass" or forbidden intrusion into a constitutionally protected area because the microphone allegedly used was

allegedly placed at the bottom of a door in the Agents' own room adjoining the room which was being "bugged"? That is, assuming *arguendo* that the facts as to the method of the Waldorf-Astoria allegedly "non-trespassory" eavesdropping in this case are indistinguishable from those in *United States* v. *Pardo-Bolland,* 348 F. 2d 316 (C. A. 2 1965), cert. denied 382 U. S. 944, 946, should *certiorari* nevertheless be granted here to examine anew the principles enunciated by the Court of Appeals in *Pardo-Bolland* especially in the light of (a) the recent unqualified pronouncement in *Berger* v. *New York,* 385 U. S. 967 that "use of electronic devices to capture [conversation is] a 'search' within the meaning of the [Fourth] Amendment • • •"; (b) the recent apparent extension of Fourth Amendment tests to electronic search activity of even the "minifon" type in *Osborn* v. *United States,* 385 U. S. 323; (c) the granting of *certiorari* in *Katz* v. *United States,* argued *sub* No. 35, October Term 1967;* (d) the developments in the *Black, Schipani, O'Brien-Parisi, Granello-Levine* and *Hoffa* cases (all cited and discussed *infra*) which indicate further possibility of a plenary Fourth Amendment approach to electronic surveillance; and (e) President Johnson's sweeping directive of June 30, 1965 to the entire Federal Evecutive establishment (antedating by nearly six months the Waldorf-Astoria eavesdropping here involved) which apparently rendered *ultra vires any* Federal electronic surveillance unless previously cleared with the Attorney General as to legality and as to decent regard for private rights and then only where the national security is at stake?

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* This petition is being printed in time for filing not later than December 12, 1967; down to Friday, December 9, 1967, this Court had not yet decided the *Katz* case.

2. Assuming *arguendo* that *Pardo-Bolland* is good law on *its* facts and need not be re-examined, is not the instant Waldorf-Astoria "bugging" factually distinguishable from that in *Pardo-Bolland,* even accepting the Government's own description of how the Waldorf-Astoria "bugging" was done, (a) in that our case involved a double-door arrangement between adjoining hotel rooms whereas *Pardo-Bolland* involved a single-door barrier, so that in our case there was actually a "trespassory" intrusion into the specially-provided (for *added* privacy) air space between the two doors, by reason of the admitted physical entry into that privacy-purposed air space by several of the Government's agents in preparing for the installation of the microphone; (b) also in that the "bug", as a matter of incontestible technological fact, operated as a "parabolic mike" trespassorily operating upon, through and beyond the aforesaid air space; (c) also in that in our case the issue is expressly presented that the "bug" admittedly utilized the hotel electric current as its power source so that the common wiring system of the hotel, serving all the hotel's guests, was turned into a means for electronic spying; and (d) in that in our case the issue is expressly presented that the hotel management secretely connived with the Government to plant the Agents in the adjoining room desired by them for the electronic spying, thus betraying the trust of a hotel guest who relied on his host not to betray his privacy?

3. Under the appellate supervisory responsibility to cleanse Federal criminal justice of unconstitutional taint—a responsibility currently focused on official electronic spying—should not the Court of Appeals have done much more than it did to assist the petitioners in probing into the full facts of the electronic spying in this case? Petitioners having striven in the Court of Appeals over a period of several months (*via* a massive and numerous

series of motions etc. based on elaborately specific factual showings) to demonstrate that the Government was holding back relevant information about its electronic spying activities, and the Government having at last reluctantly disgorged that two previously undisclosed trespassory buggings (in addition to the Waldorf-Astoria bug) had been perpetrated, should not the Court of Appeals have ordered a plenary remand for a hearing on all electronic spying in the case? Was it constitutional, fair or rational to grant a remand for a new electronic eavesdrop hearing without including the Waldorf-Astoria bugging, in the face of the revelations at last that the Government had so poor an appreciation of its own constitutional responsibilities of voluntary disclosure in this case, and above all in the face of our highly circumstantial demonstration in the Court of Appeals that the Narcotics Agents who testified at the original pre-trial hearing concerning the technical method of the Waldorf-Astoria "bug" must almost surely have been testifying falsely, and that it was demonstrably a virtual technological certainty (*on the present record*) that the "bug" must have been of an outright trespassory character rather than of the *"Pardo-Bolland"* type?

4. Did both of the Courts below err in ruling that the Waldorf-Astoria eavesdrop evidence was constitutionally admissible?

5. Aside from the Waldorf-Astoria phase, were petitioners denied due process by the conduct of the Government and the rulings of both Courts below in regard to other electronic eavesdropping, the Government having belatedly admitted (at the appeal stage) two other trespassory buggings (which it claimed did not materially affect the convictions), the Court of Appeals having then remanded the case for a "full hearing" as to "these and

other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring * * *)", the Government then having made what we contend was a grossly insufficient explanation and disclosure in the ensuing remand hearing, petitioners despite these handicaps having then gone on to adduce sworn direct testimony in the remand hearing that Narcotics Agents had boasted of a successful trespassory automobile bugging in Georgia which helped to break this case, the District Court in the remand hearing then having rejected this evidence of ours on grounds of credibility and on the basis of such rejection having relieved the Government of any further burden of explanation or of going forward (even though no Agent or anyone else took the stand to deny our proof that Agents had boasted as aforesaid), and both of the Courts below having concluded that the remand proceeding was procedurally adequate and had produced no showing "that any of the evidence used against [petitioners] at the trial was tainted by any invasion of their constitutional rights"?

6. Should not the Waldorf-Astoria eavesdrop proofs have been excluded from evidence in any event because of the very poor probative quality of the tape recordings, which were in the French language, pervasively garbled and gapped, unsatisfactorily proved as to voice identification, and not satisfactorily translated for the jury by a fair due process translation procedure?

7. In the event of the granting of *certiorari*, the above Question No. 6 and the following additional questions (not argued in this petition) are respectfully preserved

(a) Was the evidence sufficient for submission to the jury or for conviction?

(b) As to petitioners Dioguardi and Sutera, was the evidence sufficient to prove knowledge of illegal importation of narcotics?

(c) As to petitioner Nebbia (and, by prejudicial overflow, as to the other petitioners) was there a denial of due process, right of confrontation, right to be present at one's own trial for crime, and effective assistance of counsel, by the refusal of the trial Court to provide Nebbia with an impartial, Court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings, it being undisputed that Nebbia cannot understand or speak English?

(d) Was the Government's seizure of the narcotics in Georgia done by unconstitutional search and seizure?

(e) Were petitioners denied a fair trial by the trial Court's handling of a request from the jury to have read to them the testimony as to what the Narcotics Agents overheard in alleged conversations between petitioners Dioguardi, LeFranc and Sutera at the Adano Restaurant in New York City, the trial Court having allowed to be read to the jury only the direct testimony of the Agents themselves and not their cross-examination testimony which latter we contend had destructively impeached their direct testimony of having been able to overhear what they said they overheard as a matter of the sheer physical possibilities of the scene?

(f) Were petitioners denied a fair trial by an impartial jury in view of the fact that after commencement of the trial in New York City an article appeared in a newspaper of that City referring to petitioner Dioguardi as follows: "Frank Diaguardi [*sic*] 42, identified by the Government as

an underworld figure here", and the trial Judge having refused to hold a hearing on whether the Government had in fact "leaked" the information?

Constitutional Provisions and Statutes Involved

The case involves the Fourth (search and seizure), Fifth (due process and self incrimination), Sixth (impartial jury, confrontation, presence at trial, assistance of counsel) and Ninth (reserved right of privacy) Amendments of the United States Constitution. It also involves 21 U.S.C. §§ 173, 174 (narcotics violation), and F.R.Cr.P. Rule 28 (b) (Court appointed interpreters); these statutory provisions are quoted in Appendix D hereto *infra*.

Statement of the Case

1. Introductory

Petitioners were tried together on a charge of narcotics importation conspiracy (21 U.S.C. §§ 173, 174), and they were all convicted (S.D.N.Y., Palmieri, D.J. and a jury). They were sentenced as follows: Desist, 18 years; Dioguardi, 15 years; LeFrane, 20 years and a committed fine of $5,000; Nebbia, 20 years and a committed fine of $5,000; Sutera, 10 years. The United States Court of Appeals for the Second Circuit has affirmed all of the convictions; this petition seeks review of the judgment of the Court of Appeals.

Since the only points argued in this petition relate to electronic eavesdropping—other issues being preserved in the event of the granting of *certiorari* (Question No. 7, *supra*)—we shall only briefly summarize the trial proofs as a whole:

The Government's theory of the case was that petitioner Desist, a United States Army Major stationed in France,

and Herman Conder, a United States Army Warrant Officer in France,* in October 1965 shipped to the United States a deep freeze unit in which was concealed a large quantity of pure heroin; that Desist came to the United States in December, 1965 to contact Conder who had meanwhile moved back to this country, and to get possession of the heroin in collaboration with petitioners Nebbia and LeFranc; that Nebbia and LeFranc also came to the United States around that same time; that in Nebbia's hotel room at the Waldorf-Astoria Hotel in New York City he held conversations (separately) with Desist and LeFranc which revealed alleged important details of the alleged conspiracy as overheard and recorded on an electronic apparatus which the Government claimed involved no "trespass" because the apparatus was claimedly located entirely within the bounds of a hotel room engaged by Narcotics Agents, immediately adjoining Nebbia's hotel room; that after the "bugged" Waldorf-Astoria conversation between Nebbia and LeFranc, the latter was followed by Narcotics Agents who saw him meet with petitioners Dioguardi and Sutera, and thereafter the Agents overheard LeFranc, Dioguardi and Sutera conversing at a small bar in a New York City restaurant (Adano's), the conversation allegedly being relevant to the within conspiracy charges and indicating (according to the Government) that Dioguardi and Sutera were negotiating with LeFranc for purchase of the heroin which was somewhere in Georgia or the Georgia region; that thereafter Nebbia and LeFranc flew to Columbus, Georgia where they met Desist; that Desist was staying at the Black Angus motel in Columbus, Georgia; that Nebbia and LeFranc rented a car in Columbus and later another car in Atlanta in

* Conder was indicted in this case, but was severed for trial and he testified for the Government.

which they made various perigrinations denoting furtive purpose and activity; that Nebbia and LeFranc visited Desist's room at the Black Angus motel; that Desist met with Conder at the Black Angus hotel restaurant; that the Agents tracked down Conder and placed his home under surveillance; that Nebbia and LeFranc, evidently suspicious that they were being watched, returned to New York, and Desist did likewise, without taking possession of the heroin; that Nebbia and LeFranc had been followed by Government vehicles as they traveled around the Atlanta-Columbus region; and that on the day after Nebbia, LeFranc and Desist left the Georgia region the Agents, under a search warrant, seized the heroin from Conder, and then placed him under arrest.

The Government's proofs at the trial consisted of testimony by Conder; testimony by Narcotics Agents as to the New York City eavesdropping, the Adano restaurant conversation, and the movements of the various defendants in New York and Georgia; testimony by airline employees, car rental company employees and the like; and the introduction into evidence of the seized heroin.

We take it that there neither is nor can be any dispute that the prosecution and conviction of the petitioners is ineradicably bound up with the results and proofs of the Waldorf-Astoria eavesdropping.

There was no proof by the Government at the trial, and no other indication until the appeal (*infra*), that the Government had also trespassorily "bugged" one of the rental automobiles used by Nebbia and LeFranc in Georgia.

2. Description of the record items needed for evaluation of the electronic eavesdrop issues.

In view of the recent changes in this Court's Rules as to filing of the record on petition for certiorari and the elimination of the former appendix practice, a case like the present one presents to a petitioner for certiorari a number of "logistical" difficulties. The only issues which we feel we can adequately present in this petition (considering space limitations) are the electronic eavesdrop issues, but even so limited the record materials to which we should like to invite the Court's attention are voluminout, and we should have wanted very much the right of filing with this joint petition a conveniently compiled special appendix embodying what we deem to be the really indispensable record items without which, we fear, the persuasiveness of our electronic eavesdrop contentions may not emerge.

As the Court will have gathered from our Questions Presented (and from the two opinions below which are printed as appendices A and B hereto, *infra*), the present record contains voluminous documentation pertaining to the electronic eavesdrop issues. Both in quantity and in importance the great bulk of that documentation entered the record for the first time during the appeal stage, whose initial phases coincided generally with the then newly spurred interest of this Court and of the Department of Justice concerning electronic eavesdropping that was initiated by the *Black-Schipani* developments during the second half of the year 1966. The numerous and detailed turns and evolutions which the electronic eavesdrop issues in this case have gone through during the appeal stage alone are hopelessly beyond the scope of a petition for certiorari except in a most briefly summarized form which perforce loses much of the flavor or atmosphere needed

to convey to a newcomer to the situation that convincing sense of injustice derivable from the record when read in detail. The problem for the certiorari petitioners in the present instance is not eased, of course, by the fact that two lower Courts have rejected the petitioners' electronic eavesdrop contentions. We hope to show in this petition that, notwithstanding the fact that the two opinions below read powerfully indeed (on the electronic eavesdrop issues), their power is only on the surface. We pray that this Court may find it appropriate to dig deeper. Shortly after the filing of this petition we shall make a motion in this Court for permission to file nine copies of a special appendix or compiliation of the pertinent record items on the electronic eavesdrop issues. Meanwhile, we have requested the Clerk of the Court of Appeals to be sure to include in the record for filing in this Court *all* of the appellate proceedings relating to the eavesdrop issues, including briefs and other written presentations and communications (*i.e.*, not limited to formal "motions" as such of the parties), some of the principal documentary presentations in the Court of Appeals having been in a form other than that of "motions" as such.

For petitioners, the items deemed essential in this record for a proper understanding of the electronic eavesdrop issues, are as follows:

I. The original pre-trial motion for suppression of evidence obtained by electronic eavesdropping (R. 2873-2876).

II. Transcripts of pre-trial proceedings on electronic eavesdrop motions dated April 27, May 4, June 7, June 8, 1966 in which the Government revealed the Waldorf-Astoria bugging and represented that there was no other electronic surveillance or telephone wire tappping (cited

infra by date and by separate page numbers for each date).

III. The trial minutes pertaining to introduction of the Waldorf-Astoria eavesdropping evidence (pertinent pages cited at appropriate pages *infra*).

IV. Printed brief for appellant Nebbia in the Court of Appeals.

V. Printed brief for appellants Dioguardi and Sutera in the Court of Appeals; printed brief for appellant LeFranc in the Court of Appeals.

VI. Typewritten "Motion for Permission for Electronic Consultant to Listen to and to Inspect Tape Recordings" filed by appellants in the Court of Appeals, January 4, 1967 (supplementing the aforementioned printed briefs as to appellants' requests for "Schipani" review of electronic eavesdropping, and especially requesting *de novo* scrutiny of the Waldorf bugging).

VII. Typewritten "Motion for Supervisory Orders *Re* Electronic Eavesdropping Issues, etc.", filed by appellants in the Court of Appeals on or about January 11, 1967 (supplementing item VI, *supra*).

VIII. Typewritten "Affidavit in Opposition" by Assistant United States Attorney Otto G. Obermaier, filed in the Court of Appeals, sworn to January 5, 1967.

IX. Typewritten "Affidavit in Opposition" by Mr. Obermaier, filed in the Court of Appeals, sworn to January 19, 1967.

X. Printed "Brief for the United States of America", the Government's main brief on the merits in the Court of Appeals, filed January 17, 1967.

XI. Typewritten "Supplemental Brief for Appellants", filed in the Court of Appeals January 25, 1967, after the argument of the appeal, which was held January 19, 1967 (mainly devoted to the subject of President Johnson's order of June 30, 1965, curbing electronic spying by federal officers).

XII. Typewritten "Supplemental Memorandum for the United States of America", filed in the Court of Appeals, dated February 1, 1967, replying to item XI *supra*.

XIII. Letter dated February 15, 1967 from United States Attorney Robert M. Morgenthau to the Court of Appeals Panel, negating the existence of any "Schipani" materials affecting this case.

XIV. Typewritten "Motion for Permission to File Supplemental Statement for Appellants After Oral Argument", filed in the Court of Appeals on or about March 27, 1967, contending that Mr. Morgenthau's letter of February 15, 1967, *supra*, did not adequately dispose of the "Schipani" question.

XV. Letter dated April 18, 1967 from the Clerk of the Court of Appeals to Mr. Morgenthau requesting "clarification" of the latter's letter of February 15, 1967 (*supra*), and stating in part, "What the Panel wants to know is whether [the "Schipani"] review has disclosed any trespass committed in connection with the monitoring in the above case".

XVI. Letter dated April 27, 1967 from Mr. Morgenthau to the Clerk of the Court of Appeals stating (conclusorily) that "there was no trespass committed" in the Waldorf-Astoria bugging, and disclosing for the first time that two other trespassory buggings had occurred but had not materially affected this case.

XVII. Letter (consisting of thirty pages) dated May 1, 1967 from Abraham Glasser (of counsel for all appellants) to the Clerk of the Court of Appeals urging a full "Schipani" hearing in view of all of the foregoing.

XVIII. Order of the Court of Appeals dated May 29, 1967 remanding the case to the District Court for a hearing limited to the two instances of trespassory electronic eavesdropping first disclosed in Mr. Morgenthau's letter of April 27, 1967, *supra*.

XIX. Typewritten "Motion for Amendment of Remand Order of May 29, 1967", filed by appellants in the Court of Appeals on or about June 12, 1967 requesting enlargement of the remand order to cover any and all electronic eavesdropping of any kind which may have related to this case, including the Waldorf-Astoria eavesdropping.

XX. Order of the Court of Appeals dated June 14, 1967 enlarging the remand order as prayed in item XIX., *supra*, but excluding the Waldorf-Astoria phase.

XXI. Transcript of minutes of remand hearing before District Judge Palmieri, June 7, June 14, June 19, June 26, July 6 (erroneously dated

July 7), July 11, July 18, and July 25, 1967 (hereinafter cited by separate dates and page numbers thereof), together with exhibits, especially defendants' exhibit A ("Tentative List of Witnesses for Defendants") dated July 6, 1967), and defendants' exhibit B ("Statement for Defendants Explaining the Relevancy of Testimony Sought From Witnesses listed in 'Tentative List of Witnesses' etc.") dated July 11, 1967.

XXII. Typewritten "Brief for Defendants-Appellants After Remand Hearing *Re* Electronic Surveillance with Requests for Findings", filed in the District Court on or about August 21, 1967.

XXIII. Government's typewritten "Pre-Hearing Memorandum of Law", "Post-Hearing Memorandum of Law" and "Proposed Findings of Fact and Conclusions of Law", filed in the District Court at the remand hearing, June-August 1967.

XXIV. Memorandum opinion of District Judge Palmieri on remand hearing, filed August 30, 1967, printed as Appendix B hereto, *infra*.

XXV. Typewritten "Brief for Appellants After Remand Hearing *Re* Electronic Surveillance", filed in the Court of Appeals on or about September 29, 1967.

XXVI. Printed "Supplemental Brief and Appendix for the United States of America", filed in the Court of Appeals after remand hearing Dated October 9, 1967 (the "Appendix" contains the aforementioned defendants' exhibits A and B mentioned in XXI, *supra*).

XXVII. Opinion of the Court of Appeals affirming the convictions, dated October 13, 1967 (printed as Appendix A hereto *infra*).

In referring *infra* to the above twenty-seven Roman-numbered items, we shall cite them sometimes by a descriptive citation and sometimes also by the appropriate Roman-number given in the above listing, as may best serve convenience and clarity.

3. The unfolding of the electronic eavesdrop issues in this case: Synopsis.

As above suggested, adequate appreciation of the eavesdrop issues herein is difficult without detailed examination of the above listed twenty-seven items. However, the panoramic picture may be glimpsed from that listing in itself, and the following synopsis may be of further help—our principal presentation being reserved until our "Reasons for Granting the Writ" *infra* (record references for the factual recitals in the following synopsis appear in the "Reasons", *infra*):

At the pre-trial proceedings in May-June 1966 before District Judge Palmieri (items I, II, *supra*) the defense moved to suppress electronically obtained evidence, the Government made known that it intended to use evidence from an electronic auditing of Nebbia's room at the Waldorf-Astoria in December 1965, the Government also represented that there had been no other electronic eavesdropping or telephone wiretapping, and Judge Palmieri held a hearing as to the Waldorf-Astoria bugging, which resulted in a finding of "no trespass".

At the trial of this indictment (June 15-July 11, 1966) the Government used the Waldorf-Astoria bugging evidence, renewed defense objections as to its admissibility

and defense objections as to its probativeness being overruled. As previously noted, the prosecutor in summation touted the Waldorf-Astoria eavesdrop evidence as having been triumphantly vital in the Government's making of this case (R. 2244).

Petitioners were sentenced August 30, 1966. Their appeal was argued January 19, 1967. During that interim the now famous happenings of *Schipani* v. *United States*, 385 U. S. 372, occurred. The possible impingements of *Schipani* were promptly brought to the attention of the Court below in connection with this case. Commencing with appellant's (petitioners') opening briefs in the Court below (items IV-V, *supra*), we endeavored to reopen before that Court the electronic eavesdropping issues in this case. In the relative leisure of our re-study of the record for the purposes of the appeal, we had perceived meanings which had previously escaped us, in connection with the testimony of the Narcotics Agents at the pre-trial Waldorf-Astoria suppression hearing; and the advent of *Schipani* seemed to us to offer an entirely proper procedure for reopening the question of the constitutionality of the Waldorf-Astoria "bugging".

Our above Roman-numbered listing of motions etc. reflects the necessity to which we were put by the tooth-and-nail resistance of the office of the United States Attorney for the Southern District of New York in the struggle over whether the within narcotics convictions deserve to survive a thorough constitutional scrutiny as to prosecutive use of electronic spying. In this struggle there were two crucial phases, namely, (1) a reopening of the question of the constitutionality of the Waldorf-Astoria bugging, and (2) a "Schipani" review to determine whether there had been any other electronic surveillance in this case notwithstanding the Government's pre-trial representation

to Judge Palmieri that the Waldorf-Astoria bugging was the only such incident.

We were never able to persuade the Court of Appeals to reopen the Waldorf-Astoria case. That Court did order a plenary hearing as to any other electronic eavesdropping relating to this case. Such hearing was held and resulted in a finding that, although the Government had belatedly admitted to trespassory buggings—in addition to the Waldorf-Astoria situation—no showing was made that any evidence used against petitioners at the trial was tainted by any invasion of their constitutional rights.

Reasons for Granting the Writ

I. The *Pardo-Bolland* case and the Waldorf-Astoria eavesdrop.

By the Government and the Courts below it has evidently been taken as an axiom throughout this case that the electronic eavesdropping in Nebbia's room at the Waldorf-Astoria Hotel was legally and constitutionally permissible under the rule of *United States* v. *Pardo-Bolland*, 348 F. 2d 316, 321-323 (C. A. 2 1965), cert. denied 382 U. S. 944. That is, the same or substantially same type of electronic eavesdrop installation approved in *Pardo-Bolland* is said to have been used in this case, *viz.*, a microphone taped to the bottom of a hotel room door having a slight aperture whereby conversations were bugged in an adjoining room. We contend that the method of electronic bugging used in the present case was radically and, from the constitutional standpoint, decisively different from that in *Pardo-Bolland*. If we are wrong in that contention, we request disapproval the *Pardo-Bolland* rule (which this Court has thus far not affirmatively embraced in any event).

On the basis of the present record, without more, there is strong factual and legal ground for urging that the electronic bugging of Nebbia's hotel room was done in a manner which takes it outside the protection of the *Pardo-Bolland* case, *supra,* and brings it within the ban of the rule against the "trespassory" types of electronic eavesdropping. E.g., *Silverman* v. *United States,* 365 U. S. 505; *Clinton* v. *Virginia,* 377 U. S. 178.

The basic electronic installation which the Government states was used in this case was the attaching, by adhesive tape, of what is known as a multi-directional microphone to the bottom of the door in the agents' hotel room (Room 1602), there being a small aperture at the bottom of the door (about 3/8"), and the microphone being tilted at an angle of forty-five degrees, i.e., tilted back in the direction of the agents' room in such a manner as to form a cup that would act as a sound collector (see the photographic exhibits, Govt. Ex's 1, 2, 3, 4, in ev. at Tr. of June 7-8, 1966, p. 105). A wire ran from this microphone to a bathroom in the agents' room where the wire connected to what is known as a pre-amplifying device which in turn was connected to a tape recorder that also had an auditing device by which the agents could listen at the same time that the sound was being recorded on the tape.

It is important to note that the door in the agents' room to which the microphone was allegedly taped was *part, and part only,* of the separation between the two rooms. There was also, separated by a narrow space of only a very few inches from that door in the agents' room, a similar or identical door leading into Nebbia's room. In other words, the two rooms were separated by a double door with a narrow air space between them, a double door construction of the familiar type found in many hostelries

of the better class. This, in turn, means that between these two immediately adjoining doors the narrow air space which existed was *common* to each room and formed, so to say, a common *cushion* of an acoustic nature; and at the same time, and more significantly for present purposes, if formed, *when (but only when) electronically bugged from either room in the manner claimed by the Government itself, a common sound chamber.*

The particular method of multi-directional microphone electronic bugging which the Government itself asserts was used in relation to the double-door-air-space situation of the two adjoining rooms in question, amounted (on the Government's own factual representations, we repeat) to what electronic sound technicians commonly denominate as (using their various terminological synonyms) a form of *intrusive* electronic bugging employing the principle of the "tuned chamber", or "resonator tube", or "resonator chamber", or "tuned resonator", or "frequency cavity chamber" or—turning now to terminologies which may be more familiar in the contemporary lay vocabulary during the current era of heightened interest in electronic bugging—the principle of the "tubular microphone", or "pipe microphone", or "shotgun microphone" or, what is probably the contemporaneously most familiar (and frightening) term of all of these, the principle of the "parabolic mike". That is to say, when a multi-directional microphone is taped to an aperture of a narrow airspace of the type here involved (the double door setup between the agents' and Nebbia's room) in the manner here done and at the angle of tilt here used, that microphone operating in combination with the narrow intervening airspace becomes a "parabolic mike" for the purpose of electronically bugging the adjoining room space, *viz.*, Nebbia's Room 1600 at the Waldorf-Astoria.

All of our foregoing recitals, and remarks, concerning what we have termed the "parabolic mike" character of the installation at the Waldorf-Astoria, are based, we respectfully repeat, on the Government's own description of the installation. The decisive physical feature in this picture is the *double-door with narrow intervening airspace.* The supposedly identical or dispositively similar microphone installations in the hotel or motel rooms involved in *Pardo-Bolland,* did not involve *double doors (infra).*

The classic expression by this Court in defense of room-privacy against electronic-eavesdrop intrusion where the latter is sought to be constitutionally condoned as being technically "non-trespassory", was made in *Silverman* v. *United States,* 365 U. S. 505, where the electronic buggers utilized, with what proved to be a constitutionally abortive intention of "non-trespassory" finesse, a minimally intrusive device for picking up what amounted to sound-chamber products in a heating duct system of the premises there involved. In the particular kind of double-door-with-narrow-intervening-airspace that is involved in our case, the airspace or sound-chamber is the equivalent, we suggest, both under the laws of physics and under the law of the United States Constitution (Fourth and Fifth Amendments), to the sound chamber which in *Silverman* consisted of the heating duct system. The case is radically distinguishable, in fact and in law, from *Pardo-Bolland,* where only single (not double) adjoining doors were involved.

In short, the airspace between the double doors in our case had a necessary effect if not an express engineering purpose of creating an acoustical barrier or air cushion for the benefit of additional privacy for the Waldorf-Astoria's guests—so that such air space may properly be deemed to be part of the premises of Nebbia's room, and the Govern-

ment's utilization of this air space in the particular bugging installation here claimed by the Government to have been used became in literal effect a perversion of the privacy barrier, forming part of Nebbia's premises, into a means for directly invading his privacy.*

We have examined the record and briefs in the Court of Appeals in *Pardo-Bolland,* and the certiorari papers in that case, and it does not appear that any argument or analysis along the lines here being suggested was advanced. In the petition for certiorari in *Pardo-Bolland* (p. 6), it was merely stated, conclusorily and without demonstration, that the microphone taped to the agents' side of the door between the two rooms was "an unauthorized physical penetration into the premises occupied by" *Pardo-Bolland,* within the meaning of the *Silverman* case; and it was suggested that an engineer with calipers or a micrometer might be needed to determine the depth or degree of penetration, "fractions of inches" being urged as having no significance in view

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* We are aware that similar reasoning could be urged in a case like *Pardo-Bolland, supra,* where a single door was used on the agents' side, or in a case like *Goldman* v. *United States,* 316 U. S. 129, where a dictaphone was placed against a common wall; said installations being judicially approved (condoned might perhaps be the better word). However, we are not aware that any argument was advanced in either of the latter cases along the lines here being suggested, namely, that where an apparently expressly designed acoustical barrier for *enhancement* of privacy has been provided the deliberate perversion of such privacy barrier into an anti-privacy device presents a Fourth Amendment issue. As a matter of fact, this form of instrusion into an acoustical air space barrier actually makes for a prounouncedly more efficient electronic eavesdrop, with the type of device that the Government says it here used, than is true in cases like *Pardo-Bolland* and *Goldman* where only a single door or single wall partition is involved. See item VI in the Roman-numbered listing of record items, *supra.*

of the *Silverman* case. Our position here does not depend upon demonstrating any "physical penetration" in the conventional sense, as was futilely attempted to be shown in *Pardo-Bolland;* our position depends rather upon a specific analysis of the electronic and acoustical circumstances which we say here point to an unauthorized invasion of an integral part otf Nebbia's private "close", namely, his acoustical privacy barrier provided by the double door arrangement with air-space in between.

One factual feature which is common to *Pardo-Bolland* and to our case is that in both cases the hotel management secretly cooperated with the Government agents to enable the latter to breach the privacy of the respective hotel guests' rooms. However, the record, briefs and certiorari papers in *Pardo-Bolland* do not indicate that this circumstance was raised or that it entered into the consideration or decision of the case. See our description *infra* of the pertinent record items herein which bear upon the actions of the Waldorf-Astoria Hotel management in cooperating secretly with the agents for the purpose of depriving Nebbia of the privacy of his hotel room. If the Fourth Amendment, as we take it is unquestionable, expresses a historical-social policy in favor of certain minimum civilized standards of decency in regard to attempted invasions of the constitutionally protected right of individual privacy, this sort of stealthy and conspiratorial plotting between secret police investigators and a man's trusted hotel host, surely calls for Fourth Amendment scrutiny. Cf. Mr. Chief Justice Warren's concurring opinion in *Lopez* v. *United States,* 373 U. S. 427, 444, where similar instances of breach of trust or confidence are referered to in disapproving terms; and cf. also the statement of the Government's counsel in the oral argument of *Hoffa* v. *United States,* 385 U. S. 293, that while the Government conceded "no difference under the

Fourth Amendment" as regards the question of closeness or trust in confiding one's secrets to another person, "perhaps there is a due process difference. There is a point—and [Chief Justice Warren's] concurring opinion in *Lopez* suggests—where closeness will affect due process." 35 U. S. Law Week 3136. This Court's decision in *Hoffa* specifically notes that "it is obvious that petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin [Hoffa's supposed close friend and associate] or in Partin's presence. Partin did not enter the suite by force or by stealth. *He was not a surreptitious eavesdropper.* * * * The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. * * *." (Emphasis added)

Let us now examine some of the pertinent additional record details of the Waldorf-Astoria eavesdrop.*

In pretrial proceedings the prosecutor (Mr. Tendy) announced, after checking with one of the narcotic agents (Fitzgerald), that he knew of no other eavesdropping in this case except that which occurred in New York City (R. 3157-3158).

In another pretrial session Narcotics Agent Durham described the Waldorf eavesdrop equipment as consisting of "a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately

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* References *infra* to item VI of our listing of record items *supra*, may be of special interest to the Court because said item VI is our motion in the Court of Appeals which presented a detailed technological affidavit by Bernard B. Spindel, generally acknowledged to be the leading expert in this country on electronic eavesdropping techniques.

1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here." (Tr. May 4, 1966, pp. 5-6). Durham also explained that the amplifier would act as a pre-amplifier to boost the power of the tape recorder when the eavesdropped sound signal dropped to a volume level too low to record normally on the tape recorder (*id.*, p. 6); that the Concord tape recorder operated either from its own battery pack *or from room current** (*ibid.*); and, referring to the manner in which the microphone was placed and taped at the bottom of the door, that "By using this tape thusly (indicating) it becomes somewhat a collector of sound, directing the sound into the microphone itself" (*id.*, p. 7).*

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* See our Questions Presented, No. 2, subd. (c), *supra*. Both Durham and Agent Kiere later testified flatly that the apparatus had been operated on the hotel current (Tr. of May 4, 1966, pp. 9-10; June 7-8, 1966, p. 108).

* See our motion in the Court of Appeals filed January 4, 1967 (item VI. in our listing of record items, *supra*), where it is shown in the affidavit of Bernard B. Spindel that the Shure Brothers microphone model MC 11 J which Agent Durham says was used is a low impedance microphone of only 1000 ohms, not the 1700 ohms stated by Agent Durham; that this fact is objectively demonstrable from standard catalogue materials; that the MC 11 J microphone would absolutely not have "matched precisely with this Concord model no. 330 tape recorder" which Durham said he used; that the pre-amplifier mentioned by Agent Durham would have been absolutely indispensable on the basis of *constant* operation to get any results at all, which in turn leads to the difficulty that the agents' testimony is that the pre-amplifier was not used constantly; that it is difficult if not impossible for the installation described by Durham to have worked, pointing to the strongest likelihood that a quite different installation was used, of a type which almost surely would have entailed a

(Footnote continued on following page.)

Agent Kiere, who had operated the Waldorf-Astoria eavesdrop machinery, said that it was necessary to regulate the volume of the pre-amplifier in the bathroom, saying, "This was rather critical because of the closeness of the microphone and occasionally there would be a feedback effect with a high piercing screech, where I would have to lower the volume" (*id.*, p. 10). Agent Durham said he had instructed Kiere to use the pre-amplifier only when necessary to improve audibility, "so that you don't overload the entire circuit" (*id.*, p. 16). Durham also said that there was a voice-actuated function in the equipment which would actuate the tape recorder at times when such might not be desired (*id.*, p. 20).*

(Footnote continued from preceding page.)

physical intrusion or "trespass" into Nebbia's room; that a multi-directional microphone thus placed and taped to focus upon sound received through the air space between the two doors becomes a "parabolic mike"; that despite the taping (and despite muffling by a cloth towel also mentioned by Durham—Tr. of May 4, 1966, p. 8) the type of microphone here assertedly used would inevitably also pick up sound in the agents' room. We indicate, *infra* the extremely interesting significance of this latter problem of the picking up of sound in the agents' room.

* The items mentioned in the above paragraph give rise to additional problems which we pointed out to the Court of Appeals (item VI, *supra*, affidavit of Mr. Spindel): Was the use of the common hotel current in the nature of an invasion of a "common appurtenance" for the purpose of electronic spying on Nebbia, and is such constitutional? Could the equipment work at all when the pre-amplifier was not turned on? Did the feedback screech, which would presumably issue from the microphone, constitute an invasion of the air space between the two rooms or of the air space in Nebbia's own room such as might incur the constitutional ban against a physically instrusive factor occurring in the course of the electronic eavesdropping? Did the existence of the voice-actuated function necessarily subject the tape recorder to reception of far more sound from the Agents' own room than the tapes actually reveal, and, if so was the microphone actually in the Agents' room at all, or must it have been inside Nebbia's room?

Agent Durham also testified (pretrial hearing of June 7-8, 1966) that Agent Kiere told him that the door to which Durham later attached the microphone was a *connecting door* to the next room; Durham assumed that this door *opened into Nebbia's room* because of what Kiere had told him (Tr. June 7-8, 1966, pp. 98-99). Despite this testimony of Durham that he assumed from what Kiere had told him that the door on which he attached the microphone opened into Room 1600, he later said, "It was my understanding there were two doors"; he was then asked who informed him of this, and he replied (note the guarded resort to "best recollection"), "Again, to the best of my recollection, I believe Agent Kiere" (*id.*, 108-109). This theme was further pursued (*id.*, 109-112):

> "Q. Agent Durham, this door under which you placed the microphone, did you know if there was another door similar to that on the other side opening to 1602? A. Not from personal knowledge, no, sir.
>
> Q. Who told you that? A. I believe Agent Kiere.
>
> Q. Did he say that he had opened the door from 1600 to examine the other door? A. He did not.
>
> Q. Do you know if he did? A. I did not know that, no, sir.
>
> Q. Did you see any plans to know how far apart the two doors were? A. No, sir."
>
> * * *
>
> "Q. Now, did you look through the air space? Did you look throug that space? A. No, sir, I did not.
>
> Q. Did you examine that space at all? A. No, sir.
>
> Q. Did you check to see if that air space was clear to the next room? A. No, sir, I did not.

Q. Did anybody tell you whether or not that air space was clear to the next room? A. No, sir, they did not.

Q. In other words, there could have been a solid wall on the other side of that with no air space, as far as you knew, is that correct? A. Judging by the performance of the equipment I used it would be my opinion that there was not a wall.

Q. In other words, you only checked it by testing the equipment, is that correct? A. That's correct, sir.

Most interesting, in view of Durham's thus having tried to shield from discovery that any agents had opened the door on the agents' side which led to the door to Nebbia's room, is the fact that all or nearly all of the agents who testified at the hearing, except the very guarded Mr. Durham, freely admitted that they had opened the door on the agents' side of the double door arrangement. Kiere so admitted (*id.* 131). Likewise Agent Klempner, who indeed stated that the door was opened in the presence of a representative of the hotel management (*id.* 240-241). Agent Walter J. Smith said that he opened the agents' door and observed that there was no handle on the door leading directly into Nebbia's room (*id.*, 203); other agents had opened the door, including *Durham*, Kiere, Weinberg and Klempner (*id.* 217-219); Smith said he put his ear to the inner door (Nebbia's door) but could not hear anything (*id.*, 204-205, 209-210).

Thus, Smith's testimony contradicts that of Durham, the installation expert who swore he had not opened and had not been present at any opining of the door and had no idea as to the physical construction of the arrangement or the air space in between.

It taxes credulity that Durham, supposedly an experienced electronics surveillance agent, would make this important installation with the naive lack of knowledge of the physical facts as claimed by him at this hearing.* The logical inference is that, if Agent Durham was evidently so bent upon concealing the technical details of what he had done, he may well have been trying to hide something which should not legally have been done. It is very difficult to avoid the conclusion that Agent Durham has not told the entire truth, and that a grave question persists as to just what in truth was the nature of the electronic installation. *Cf.* the intriguing testimony of former Agent Weinberg, who swore that he had seen no electronic apparatus in the agents' room at all (*id.*, 263, 265-267).**

We previously referred to the absence from the tapes of certain kinds of extraneous noises which should have been audible on the tapes if the agents were telling the truth about the method of electronic installation by which the tapes were obtained. As seen, the agents' testimony was that the microphone used was of the multi-directional type, and that the installation was equipped with a voice-actuated function which would cause the equipment to go in into recording operation when a certain minimum volume of sound occurred. In other words, this was a microphone which would just as (or more) sensitively pick up sounds in the agents' own room (where indeed the sources of sound

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* See the Spindel affidavit (p. 8) in our record item VI, *supra*, stating: "As an expert in this field * * * it is incredible to me that any other qualified expert in the field would go about making an installation of this type on the basis of the lack of knowledge of the physical set up as stated by Agent Durham.

** Might this be because the equpiment was *elsewhere;* and because its linkage was with a "trespassory" installation inside or penetrating Nebbia's room?

were nearer and more open to the microphone) as in Nebbia's room; and with the voice actuated function being installed in this apparatus, there should have been heard on the tapes a substantial amount of sound coming from the agents' own room; indeed, there should have been numerous really prominent passages of sound coming from the agents' room, because there was quite a bit of sound-producing acitivity going on in that room, including extensive use of a typewriter by Kiere (R. 685, 855-860), a very actively used portable shortwave radio for constant communication with surveillance agents (R. 970-976—the "whole room could hear it" (R. 976)), the ringing and dialing of telephones and voices speaking on the telephone (R. 495-595), the playing of already recorded tapes (R. 693, 702-704) and, presumably, the various conversations among the agents in the room. Yet, by some apparently inexplicable magic this sensitive multi-directional microphone seems to have missed picking up any perceptible amount of all of the above enumerated categories of notable intra-room noise in the agents' own room. Nor can the explanation lie in the fact that one of the tapes had been processed for elimination of background noise; because, we may inform this Court, the unprocessed tapes sounded, if anything, freer of any such extraneous noise than the processed tape.

Of course, there is one completely logical explanation of how it could have happened that this highly sensitive multi-directional microphone failed to hear practically any of the numerous and strikingly obtrusive noises that it should have heard in the agents' room, and this explanation would be that the microphone was not in the agents' room, but was in Nebbia's room. The Government has never given a satisfactory explanation of the puzzle as to why the Narcotics Bureau's microphone was so prejudiced against listening to typewriters, blaring radios, clanging telephone

bells, etc., in the agents' room and was so much more receptive to listening to voices in Nebbia's room.*

As to the conduct of the hotel management in betraying Nebbia's privacy, Agent Kiere testified that Mr. Whiteman, of the Waldorf-Astoria staff, had told him that Room 1602 was the room which was to be "electronically surveyed" (*id.*, 124). Agent Shrier said he had no knowledge of anyone in the Narcotics Bureau asking the Waldorf-Astoria to assign Nebbia to a particular room (*id.*, 253). But the court prevented defense counsel from questioning other agents about this (Tr. June 7-8, 1966, pp. 128-129, 135-136, 215-217). Mr. Whiteman testified that the agents had requested a room as close as possible to Nebbia's room (*id.*, 151-152); he did not know whether any other hotel personnel had additional information about the circumstances of the renting of the two rooms involved (*id.*, 152); he did not have the hotel records pertaining to the renting of Nebbia's room, stating that the Government had taken those records (*id.*, 142); other records, which might have thrown light on the circumstances, had been destroyed (*id.*, 155-156).

In view of all of the foregoing it is difficult to understand the Court of Appeals' refusal to reopen the Waldorf-Astoria hearing. That refusal is in itself a ground for *certiorari* (Question Presented no. 3, *supra*). The interests of both the Constitution and of standards of decency demanded a reopening of that hearing upon the showing which we made to the Court of Appeals as above described. To have denied such reopening either on the idea that the

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* We are aware that Agent Kiere drew attention to one or two instances of telephone noise or human voices which he thought might have come from the agents' room, but these instances are *de minimis* in relation to the size of the problem which we think the Government faces in answering the above question.

previous Waldorf-Astoria hearing had "adequately explored" the question of "trespass", or on the idea that we had already had one chance to convince a District Court Judge and must now resign ourselves, was to apply to the resolution of this profoundly important question of constitutional right and public morality too petty a standard of Federal appellate judiciality.

But even if *certiorari* relief is not to be forthcoming here to redress our claim of injustice in the refusal of the Court of Appeals to reopen the Waldorf-Astoria phase, the facts above summarized in regard to the Waldorf-Astoria bugging are believed to have afforded easily sufficient grounds for the Court of Appeals to conclude that, *on the existing record,* it was the duty of Federal appellate Judges to reject the District Court's finding of "no trespass" at the Waldorf-Astoria. And this Court can and should reject that finding, either on the grounds of acoustical and electronic science imported into this case by the presence of the double-door factor, or on the ground of the Agents' admissions as to actual physical invasion of Nebbia's private air space in preparing for the electronic installation, or on the ground of the Agents' use of the common electric current and wiring system to perpetrate an electronic invasion of privacy,* or on the ground of connivance with the hotel management to betray the privacy of a paying guest, or on all of these and the other grounds which seem to us to be favored by the record herein and by the *Silverman* case policy of refusal to tolerate "trespass" or physical instrusion "by even so much as a fraction of an inch".

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* Let police electronic snoopers at least be put to the necessity henceforth of using their own battery packs.

Finally and in any event, the rule which the Court of Appeals in *Pardo-Bolland* assumed to be declarative of the policy of this Court should be now expressly rejected. The test should not be trespass or physical intrusion; the test should be invasion of a constitutionally protected individual right of privacy against Governmental electronic instrusion—indeed, the stealthier the invasion, the more to be condemned.

II. President Johnson's order of June 30, 1965.

In both of the Courts below we urged that if the Waldorf-Astoria bugging was done in defiance of a Presidential order it was unconstitutional because *ultra vires.*

The Solicitor General has alluded in papers filed by him in this Court, to a "policy" or "policies declared by the President on June 30, 1965, for the entire Federal establishment" which "prohibits such electronic surveillance or the use of such listening devices (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security". These words appear in the Solicitor General's now famus two documents entitled "Supplemental Memorandum for the United States", one filed in *Black* v. *United States,* no. 1029, October Term 1965, at pp. 3-4; and the other filed in *Schipani* v. *United States,* No. 504, October Term 1966, at p. 4. In the *Black* memorandum the Solicitor General further said, "The specific authorization of the Attorney General must be obtained in each instance when this exception [national security] is invoked" (p. 4). In the Schipani memorandum the Solicitor General further stated that "such [national security] intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked" (p. 4).

Counsel for the within petitioners have endeavored to find out from the Department of Justice in Washington what are the *exact textual* provisions of the above mentioned Presidential declaration of policy of June 30, 1965, but we have not been given an answer.

The reason why it is important, for present purposes, to find out if possible the exact terms of the President's policy statement of June 30, 1965, is that it is not clear from the Solicitor General's above mentioned memoranda in *Black* and *Schipani* whether the forms of electronic surveillance prohibited by the President are specifically described in relation to "trespassory" *versus* "non-trespassory" types; or whether they are described in terms of legality or illegality as laid down in any specific Court decisions; or whether the President has prohibited all forms of electronic surveillance.

One thing, however, is manifest without further inquiry. If the electronic surveillance done in the present case comes within the ban of the Prsedient's statement of June 30, 1965, it must follow as the night the day that the within judgments of conviction must be reversed. For it is unthinkable that any person should be convicted and imprisoned on evidence obtained by Federal Police in express violation of a prohibition by the President of of the United States and the Attorney General. The Government has conceded that the electronic bugging of Nebbia's hotel room in this case was not done with any authority or permission from the President or the Attorney General, but was done solely on the authority of the District Supervisor of the Federal Bureau of Narcotics, Mr. George M. Belk (R. 497-498). And, of course, the bugging here involved post-dated the President's order of prohibition by nearly six months.

Absent a valid applicable statute of Congress, can there be any question that no officer or employee of any of the "executive departments" of the Federal Government may act in exercise of *executive power* in defiance of a presidential prohibition? The point is so elementary and so axiomatic as a matter of constitutional doctrine that it seems ingenuous to emphasize it; this Court has several times had occasion to refer to the President's intrinsic supremacy over the executive departments through which he acts and which are merely his agents. "Executive power, in the main, must, of necessity, be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies * * *". *Russell Motor Car* v. *United States*, 261 U. S. 514, 523. "The heads of departments are his authorized assistants in the performance of his executive duties * * *" (*Runkle* v. *United States*, 122 U. S. 543). What should be perceived then, when any Federal law enforcement official disobeys a prohibition of the President, without valid statutory warrant for such disobedience, is that the offending officer is simply acting *ultra vires*. Once attention is focused upon this feature of *ultra vires* in such a situation, it becomes apparent immediately that the disobedient conduct of the offending Federal police officer visits, upon any person aggrievingly touched by that disobedient conduct, a denial of due process of law in the most literal and classic sense of those words. "Process of law" is "due" only when it is in accordance with "law". If it is without "law", or against "law", then *eo ipse* it is not "due process of law". Electronic surveillance done by a Federal police officer in defiance of a direct prohibition of the President of the United States is the act of a usurper. No "process" endured at the hands of a governmental usurper can ever be "due process".

The Court below refused to compel the Government to disclose the text of the President's order. This Court should apply its hand for this purpose.*

III. The Abortive Remand Hearing

As seen, the Court of Appeals remanded this case for a new hearing on electronic eavesdropping (except as to the Waldorf Astoria phase). See items XIII to XXVI, inclusive, of our listing of record items, *supra,* pp. 15-16 especially item XVIII, where the facts of the Government's obstructiveness and reluctance in the quest for the truth (prior to the remand hearing) as to its electronic activities in this case are recited; and item XXV, where the similar facts of the Government's conduct in the remand hearing itself are recited.

Against this background of obstructiveness by the Government we should have been granted the most plenary procedural facilities in the remand hearing. Specifically, the Government should have been required to submit its officers and records to unstinting examination. Instead, despite the *apparent* thoroughness of the remand proceeding, we were cut off from any real opportunity to probe the conclusory, self-serving "proof" of the Government denying "materiality" as to the two newly admitted trespassory buggings (ses item XVI of the listing of record items, *supra;* and, again, item XXV, *passim*).

Certiorari should be granted to remand the case for a proper plenary hearing in which the Government may be compelled to make real disclosure, not merely a bureaucratic semblance of "disclosure".

(We regret the necessity, dictated by space limitations, of referring the Court to the copious record items XIII to XXVI on this subject.)

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* See item XI of the record items listed *supra.*

CONCLUSION

It is respectfully submitted that this joint petition for certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 313—September Term, 1966.

(Originally argued January 19, 1967

Remanded for further limited hearing May 29, 1967

Decided October 13, 1967.)

Docket No. 30849

UNITED STATES OF AMERICA,

Appellee,

—against—

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Appellants.

Before:

MEDINA, ANDERSON and FEINBERG,

Circuit Judges.

Appeals by five appellants from judgments of conviction for violation of the federal narcotics laws, 21 U. S. C. §§173, 174, after a trial by jury before Edmund L. Palmieri, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

IRVING YOUNGER, New York, N. Y., *for Appellant Desist.*

FRED A. JONES, JR., Miami, Florida, *for Appellants Dioguardi, Sutera, LeFranc and Nebbia.*

DAVID M. MARKOWITZ, New York, N. Y., *for Appellant LeFranc.*

ARNOLD C. STREAM, New York, N. Y., *for Appellant Nebbia.*

ABRAHAM GLASSER, New York, N. Y., Of Counsel *for Appellants Dioguardi, Sutera, LeFranc and Nebbia.*

OTTO G. OBERMAIER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Michael W. Mitchell, William M. Tendy, John R. Bartels, Jr., John R. Wing, Assistant United States Attorneys, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

The five appellants were convicted under a one-count indictment charging them with a conspiracy to import narcotic drugs into the United States from France. 21 U. S. C. §§173, 174. The case involved what is alleged to be the largest single seizure of pure heroin in the United States, valued at sums as high as $100,000,000, and totalling some 209 pounds. The trial, lasting four weeks, was in the Southern District of New York before Judge Palmieri and a jury. We affirm all five convictions for the reasons stated below.[1]

1 Each appellant adopts the arguments made by the others insofar as applicable. Therefore, we will identify the appellant on whose behalf a

I. The Facts

The following statement of facts is what the jury could have found, viewing the evidence in the light most favorable to the Government. *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). It was presented to the jury primarily through the testimony of co-defendant Herman Conder[2] and various government agents.

Early in 1963, Conder, a United States Army Warrant Officer, met appellant Samuel Desist, a Major; Conder was then looking for accommodations for his wife and children, who were soon to join him in France. Conder rented one of Desist's apartments, and thereafter the two became friendly. In July 1965, when Conder was preparing to return to the United States, Desist offered to pay him $10,000 if Conder would ship a food freezer as part of his household goods. Desist told Conder not to tell the latter's wife because "women can't keep a secret." Conder agreed, and a used freezer was delivered to Conder, according to plan. At Desist's instruction, Conder took the freezer apart one day, left it in the storage area of his apartment, and found it completely reassembled the next day. Secreted into it were 190 plastic bags, each holding an average of a half-kilogram (1.1 pounds) of pure heroin.

In September 1965, the freezer was shipped by Conder, along with his other goods, to Fort Benning, Georgia; ten days later Conder and his family left for the United States. Once at Fort Benning, which is in the Columbus, Georgia area, Conder moved into a house trailer. The freezer

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point was originally urged only when the argument is peculiarly relevant to him.

2 The charge against Conder was severed at the start of the trial.

arrived in the third week of November; Conder immediately communicated this fact to Desist. On December 12, Desist flew from Paris to New York and called Conder, arranging a visit at the end of the week. Thus, the initial phase of the conspiracy—importing heroin—was successfully accomplished. There remained the efforts of Desist, with two other French exporters—Jean Claude LeFranc and Jean Nebbia—to dispose of the narcotics in this country.

On December 11, appellant Nebbia had left Paris on a plane bound for New York; five days later he went, together with appellant LeFranc, to an airline ticket counter in New York where LeFranc made a through reservation for Nebbia for Columbus, Georgia. LeFranc said that a car rented in Columbus would be used for driving to Miami. The night of December 16, Desist met with Nebbia in the Waldorf-Astoria Hotel, Manhattan. Desist said he would fly to Rochester "to see the boss" and from there by way of Atlanta to Columbus, where he would pay his contact "20 bills" for the merchandise. Nebbia was reassured that the contact was well-known to Desist; Desist said everything would be ready for Nebbia so "the transfer can be made automatically." There was an inquiry about suitcases, and Desist said it would take three or four hours to make the "transfer." Desist referred to a trailer, and the "Black Angus," a motel at which Conder had made a reservation for Desist; Nebbia said he would meet Desist in Columbus and cautioned about risks. On December 17, Nebbia and LeFranc went to buy a map together. Back at the hotel room LeFranc said he would go to Columbus from Atlanta and told Nebbia to get a car; they would purchase the suitcases. A trailer was mentioned in this conversation also.

While thus making sure of obtaining the heroin, Nebbia and LeFranc were simultaneously arranging to dispose of it. Also on December 17, appellants Frank Dioguardi and Anthony Sutera flew up to New York from Miami; in the afternoon they registered under false names at a Manhattan motel. That night LeFranc came out of a Manhattan bar and stood on the sidewalk, and Dioguardi and Sutera pulled up in a rented car and double-parked. LeFranc approached the car, had a short conversation, and entered it; the car was parked and the three went to Adano's Restaurant a few blocks away.

LeFranc told his companions he was looking forward to Atlanta, which was a cleaner place than New York, and said he would enjoy Miami; Sutera agreed with this observation and said he was also looking forward to returning to Miami. Dioguardi made a telephone call, during which he said that he was "with the man now and they were leaving for Atlanta in the morning," and that he expected to see him Monday or Tuesday the following week. Rejoining his companions, Dioguardi said everything was "o.k. . . . on my end," but there were several problems. Sutera said he and Dioguardi had not yet seen anything, and LeFranc replied that he had explained this to his friend who had assured him that "it is here already." LeFranc said that all that remained was to go down there, pick it up, and make the transfer to Dioguardi and Sutera. Dioguardi said that LeFranc's "friend" apparently didn't trust anyone; they too wanted to be careful, but at the same time wanted to know more about how the deal would come off. Sutera proposed that he and Dioguardi go to Atlanta with LeFranc to pick up the "merchandise" and save LeFranc an extra trip.

LeFranc said that was impossible; only he and his friend were to go to Atlanta and pick up the merchandise and then he would call Dioguardi and Sutera in Miami and arrange for the transfer to them. There was some more discussion about the mechanics of the transfer, LeFranc stating at one point that "in the past people have been betrayed, and everything has been lost, even the people." During dinner Dioguardi made another telephone call during which he stated that "this was a once-a-year deal and it takes time to iron out the problems." A day later, Dioguardi and Sutera flew back to Miami.

On the same day that LeFranc was meeting with the potential buyers, Desist flew to Rochester and thence to Georgia to get the heroin. That night Conder met him at the Columbus airport; Desist registered in the Black Angus Motel, and they both went to Conder's trailer. Conder told Desist the freezer was in a box adjacent to the trailer; Desist said certain persons would arrive the following afternoon at 2:00 to pick up its contents, and that Conder should arrange to have his wife away. Once at the trailer, Conder pointed out the freezer. On the next morning, Nebbia and LeFranc boarded a plane in New York bound for Atlanta; in Atlanta they changed planes for Columbus, and Desist met them at the Columbus airport that afternoon. Nebbia rented a car, ~~and the~~ three drove around and stopped at a restaurant. Desist was eventually left in the Columbus shopping area.

Nebbia and LeFranc continued driving around, winding up in Opelika, Alabama, about 4:00 P.M. There they purchased two suitcases, a foot locker and a travel bag. Arriving back in Columbus, they met Desist at the Black Angus; after a short while in Desist's room, Nebbia and LeFranc resumed their driving. Eventually, they registered at a

motel under a fictitious name. Repeatedly that day they drove in a way that would make it difficult to follow them unnoticed.

After Nebbia and LeFranc had left his motel room, Desist called Conder, and they met at a restaurant. Desist explained that the project would take longer than anticipated because the people who were to pick up the merchandise had returned to Atlanta to rent another car because they thought they had been followed. The pick up would be the following day; the people would be Frenchmen. (Nebbia and LeFranc spoke to each other in French.) Desist surreptitiously handed Condor $2,000, and pointed out that Conder could buy suitcases in the morning if necessary. Conder rejected an offer of several hundred dollars or a car for taking the contents of the freezer to Atlanta.

On Sunday morning, December 19, Desist went to Conder's trailer camp and told Conder to buy the suitcases. After driving Desist back to the motel, Conder bought four large suitcases. Back at his trailer he removed all the plastic bags from the freezer and put them in the suitcases he had bought; he had to use two of his own as well. One suitcase was placed inside the trailer and five in a shed near the trailer. This was about 1:00 in the afternoon. After Desist called and checked, Conder waited for the Frenchmen, but they never arrived.

That same morning Nebbia and LeFranc had checked out of their motel, driven to Atlanta and rented another car. They met Desist in his motel room, and saw somebody as they were leaving who they thought might be watching them. Desist then called Conder and told him that the two had become suspicious and would wait several days before coming to pick up the suitcases. LeFranc and Nebbia

meanwhile headed for Atlanta and returned the second car they had rented. They took a cab to where the first rented car was, and returned that car too. Early Monday morning they boarded a plane for New York. A few hours later Conder was arrested at his trailer and produced the six suitcases containing the heroin.

The foregoing was the Government's case. The version of the facts offered by appellants is, of course, radically different. Thus, the testimony of various government agents was attacked as incredible; e.g., as to the account of conversations overheard by agents at the bar in Adano's Restaurant, defendants argued that conspirators would not conduct meetings there when strangers were present because the bar was so small; Dioguardi introduced affirmative evidence that he had been in New York on the day in question on business; Desist offered an alibi for the night he had a supposed conversation with Nebbia in the Waldorf-Astoria; LeFranc attempted to show that he was in this country only for purposes connected with his membership in a secret French political organization.[3] But these are now fruitless gambits; the jury by its verdict rejected them, and we are bound by that disposition.

II. Sufficiency of the Evidence

All appellants urge reversal on the ground of insufficient evidence to go to the jury or for conviction under what they term "the rule of reasonable doubt." Dioguardi and Sutera argue first that there was no proof that either of them had the requisite knowledge that the narcotics were imported. There was no claim that these appellants ever had possession of the narcotics, so that the inference in

3 Nebbia and Desist also offered character testimony.

21 U. S. C. §174 could not aid the Government. See *United States* v. *Goldstein*, 323 F. 2d 753 (2d Cir. 1963) (*per curiam*), cert. denied, 376 U. S. 920 (1964). Judge Palmieri charged the jury that as to these two defendants "you must find actual knowledge that the drugs were illegally imported from abroad"; the judge also observed that the Government rested its case as to knowledge on LeFranc's statement to Dioguardi and Sutera (in Adano's Restaurant) "it is here already," and on "other evidence." Appellants contend that there was no "other evidence," and that "here" does not necessarily refer to the United States, considered as a country, but could as rationally mean one rather than another location within the United States. However, the conversation also referred to going down and picking "it" up in Atlanta. Hence, the jury could reasonably infer that "here," in a conversation taking place in New York, did not refer to the specific location of the narcotics in the United States, but rather to its arrival from overseas.

Dioguardi and Sutera also challenge the sufficiency of evidence that they conspired to deal in narcotics. There clearly was enough evidence to allow the inference that these two appellants were conspiring with LeFranc in Adano's about something. Dioguardi and Sutera had registered in New York under assumed names; while with LeFranc, Dioguardi told someone on the telephone that this was a "once-a-year deal"; LeFranc warned of the dangers for all; Dioguardi and Sutera sought to assure the transfer of "merchandise" to them, even suggesting that they go to Atlanta to assist; and their stake in, and concern over, the success of the venture was obvious. Cf. *United States* v. *Cianchetti*, 315 F. 2d 584, 588 (2d Cir. 1963). What the insufficiency argument is reduced to is that the word "narcotics" was not spoken at Adano's, so that the conspiracy

could have been to transfer something else. We pause to note that those who buy and sell narcotics normally use vague euphemisms or jargon to describe their contraband. See *United States* v. *Llanes*, 357 F. 2d 119 (2d Cir. 1966) ("stuff"); *United States* v. *Ramsey*, 374 F. 2d 192 (2d Cir. 1967) ("good 'treys' "). The basic defect of the argument is the assumption that the jury had to base its verdict against these two appellants solely on this conversation in the abstract. But, of course, this was not so. From the evidence of acts of other defendants, "verbal" or otherwise, properly before the jury,[4] it could have taken into account that Conder shipped a freezer to Fort Benning, Georgia; Desist knew Conder; Nebbia and LeFranc came to the United States; Nebbia knew Desist; Desist flew down to Georgia to meet with Conder; Nebbia and LeFranc shortly thereafter also flew down to Atlanta and met Desist; Conder transferred heroin from the freezer to suitcases; and then Nebbia and LeFranc went back to New York. These events happened within a short time (except for the initial arrival of the freezer into the United States). While it could be by coincidence that Dioguardi and Sutera were interested in other "merchandise" in Georgia that LeFranc was to transfer to them so furtively, it was a much more persuasive inference that the "merchandise" was to their knowledge narcotics. If to this is added the evidence of "hearsay" declarations of co-conspirators, there was obviously much more than enough to go to the jury, although we do not mean to imply that the evidence was insufficient without these declarations. Judge Palmieri had already decided that the declarations could be con-

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4 See *Lutwak* v. *United States*, 344 U. S. 604, 618 (1953); *United States* v. *Nuccio*, 373 F. 2d 168 (2d Cir.), cert. denied, 387 U. S. 906 (1967).

sidered by the jury and we find no error in that determination. *United States* v. *Ross*, 321 F. 2d 61, 68 (2d Cir.), cert. denied, 375 U. S. 894 (1963). Indeed, in allowing the jury again to make a preliminary determination as to the competence of this evidence, the judge was too generous to appellants. See *United States* v. *Stadter*, 336 F. 2d 326, 329-30 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965); *United States* v. *Ragland*, 375 F. 2d 471 (2d Cir. 1967). We hold that there was sufficient evidence to go to the jury on the role of Dioguardi and Sutera in the conspiracy. Finally, the mass of evidence against LeFranc, Nebbia and Desist does not warrant discussion as to its sufficiency.[5]

III. Reception into Evidence of the Narcotics

One of the most important items of evidence produced by the Government was the vast amount of heroin seized from Conder in his trailer home in Georgia. Appellants claim that it was error to admit the heroin into evidence because the warrants authorizing the seizure were defective.[6] The point was first raised by a motion to suppress in the district court, which was denied by Judge Weinfeld; it was pressed again equally unsuccessfully at trial before Judge Palmieri.

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5 We need not enter the controversy of whether the standard of ultimate persuasion ("beyond a reasonable doubt") is incorporated, as appellants assume, into the legal test of sufficiency of evidence, because the evidence met even this standard. For discussion of the problem, see Moore's Federal Practice—Cipes, Criminal Rules ¶29.06 (1966); *United States* v. *Leitner*, 202 F. Supp. 688, 693-94 (S. D. N. Y. 1962), aff'd *per curiam*, 312 F. 2d 107 (2d Cir. 1963); *United States* v. *Burgos*, 328 F. 2d 109, 110-11 (2d Cir. 1964).

6 A question of the standing of appellants to object to the seizure has been raised, but we do not have to reach it.

In support of warrants to search Conder's automobile and trailer and sheds, identical sworn statements by a narcotics agent were submitted to the United States Commissioner for the Middle District of Georgia. The statement is imposing in its detail.[7] It is claimed, however, that

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7 The affidavit in support of the warrant to search the trailer and sheds stated, in relevant part, the following:

> The undersigned being duly sworn deposes and says:
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> That he (has reason to believe) that (on the premises known as) Lot #30, in Bill Miller Trailer Park, 3318 Victory Drive, Columbus, Georgia where is located one Blue and White, in color, House Trailer residence of Herman Conder in the Columbus Division in the Middle District of Georgia, there is now being concealed certain property, namely a large quantity of Heroin which see attached affidavit which is a part of this Affidavit for Search and Seizure.
>
> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> * * * * *
>
> 1. In furtherance of a continuing investigation commenced in New York City, several weeks ago, which indicated that two individuals namely Jeanot Nebbia and Jean LeFranc, would proceed to Columbus Ga. to receive a tremedous shipment of heroin, the following facts are set forth to support my application for two search warrants.
> 2. Investigation in NYC indicated that Nebbia and Le Franc would proceed to Columbus Ga. on December 18, 1965 and would there met and receive from an individual I now know to be using the name of Sam DeSist, about 100 kilograms of heroin.
> 3. On December 18, 1965 these two individuals did arrive in Columbus and did meet at the Airport Sam DeSist. They rented a car and drove to the Buckineer Restaurant. After a long conversation Nebbia and Le Franc were followed to Opelika Alabama, where there were seen to purchase 3 bule suitcases and a large foot locker.
> 4. They then returned to Columbus and again met with Sam DeSist at the Black Angus Restaurant. After a conversation, Nebbia and LeFranc departed and speeded back toward Atlanta, Ga. Desist was followed to his room at 108 Black Angus Motel. Shortly thereafter he was seen to meet and converse with one HERMAN CONDOR. He was heard to tell Condor that they had run into difficulties.
> 5. Condor then dropped DeSist off at his motel. The following morning De Sist was followed from his Motel to the restaurant. After breakfast he depart via taxi cab. He exited the cab and

the affidavit does not affirm personal knowledge of the facts, or the source of the affiant's belief, or the reliability of that source. For example, the affidavit states that "Desist was followed to his room"; appellants ask "By whom?" Appellants rely on *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *United States* v. *Ventresca*, 380 U. S. 102 (1965).

Aguilar involved an affidavit which merely stated that "affiants have received reliable information from a credible person and do believe that heroin . . . [is] being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." The Court noted that "[i]f the facts and results of . . . a surveillance [on petitioner's house] had been appropriately presented to the magistrate, this would, of course, present an entirely different case." 378 U. S. at 109 n. 1. After discussing other similar cases where the affidavit merely stated that the affiant "has cause to suspect and does believe" certain merchandise was in a specified location,[8] or where the affidavit

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then walked some 500 yards to the Bill Miller Trailer Park. He emerged from there in the Volkswagon driven by the aforementioned Condor. They were followed to the Gaylord Shopping Center. At this location they had aconversation. De Sist was heard to tell Condor to "get the merchandise ready to move".

6. Condor then again drove DeSist to his motel and then he returned to the Gaylord Store and purchased four red suiteases. He then immediately proceeded to his trailer at the aforementioned trailer park. He took the four suitcases either into the trailer or into the two sheds immediately next to it.

7. I would like search warrants for his vehicle and the trailer and its two sheds.

[signature]
Francis E. Waters
Narcotic Agent

[Typographical errors in original.]

8 *Nathanson* v. *United States*, 290 U. S. 41 (1933).

said simply that the suspect "did receive, conceal, etc., narcotic drugs . . . with knowledge of unlawful importation,"[9] the Court stated (378 U. S. at 113-15):

> Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion."
>
> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U. S. 528, was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as

9 *Giordenello* v. *United States*, 357 U. S. 480 (1958).

> the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," *Giordenello* v. *United States*, *supra*, [357 U. S.] at 486; *Johnson* v. *United States*, *supra*, [333 U. S.] at 14, or, as in this case, by an unidentified informant. [Footnotes omitted.]

In the present case, there was more than a "mere conclusion"; the affidavit could only be reasonably read to mean that the signer conducted at least some of the investigation or spoke to those who had investigated and watched; the facts alleged show more than the affiant's mere suspicion, belief, or conclusion as to the location of the heroin; the magistrate could judge for himself the persuasiveness of the fruit of the investigation; there is no question of credibility of an "informant," since the affidavit obviously is chiefly derived either from the affiant's knowledge or that of fellow agents. The language in *Aguilar* about informants must be read in conjunction with the affidavit under scrutiny in that case. Thus, in *United States* v. *Ventresca*, *supra*, where the affiant had received his information from other investigators, the Court found "reason for crediting the source of the information" because "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." 380 U. S. at 109, 111 (footnotes omitted).

The Supreme Court has frequently emphasized that it is desirable for officers to obtain search warrants so that an independent magistrate may impartially judge whether probable cause exists, and for that reason has suggested that warrants will be examined less rigorously than searches without a warrant. E.g., *United States* v. *Ven-*

tresca, 380 U. S. at 106-07; *McCray* v. *Illinois*, 386 U. S. 300, 315 (1967) (dissenting opinion).[10] When a narcotics agent has done just what the Court encourages, reading a warrant as though it were a trust indenture can only discourage adherence to that policy. If the affidavit here is "read in a commonsense way rather than technically," 380 U. S. at 109, it was clearly sufficient. We hold that the warrants were properly issued and the heroin was admissible at trial.

IV. Admissibility of Evidence Obtained Through Electronic Eavesdropping

Another evidence problem concerns conversations between Nebbia and Desist in the Waldorf-Astoria Hotel on the night of December 16, and between Nebbia and LeFranc on December 17. Evidence of these came mainly from testimony of a government agent who eavesdropped, and from contemporaneous tape recordings.[11]

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality. Thereafter, Judge Palmieri conducted a three-day hearing during which seven law enforcement agents and a Waldorf-Astoria Hotel employee testified; the hearing even included an actual reconstruction in the hotel room of the equipment that had been used. From the evidence adduced, the eavesdropping occurred as follows: A few days after Nebbia had

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10 The dissenters in *McCray*, even though voting to reverse the conviction, explicitly recognized the principle.

11 Once again a question of standing is raaised—at least as to Dioguardi and Sutera—but it is not necessary to reach it.

checked into the Waldorf-Astoria, two agents asked a hotel official in what room Nebbia was registered, and were given the adjoining room, Room 1600. Inspection of the agents' room disclosed that a door opened on to a "very small" air space, on the other side of which was a similar door opening into Room 1602, Nebbia's room. This door to Nebbia's room was never opened, nor was anything attached to it. The agents placed a microphone against the door inside of Room 1600, with its face turned toward a ⅜ inch space between the bottom of the door and the door sill. Nothing was placed under the door, nor was the microphone inserted into the space at the bottom of the door. The microphone was wired to an amplifier and tape recorder; the agents monitored conversations taking place in Room 1602.

Defendants advance a number of reasons why it was error to admit evidence of the two overheard conversations. First they argue that the eavesdropping was "trespassory" in effect and therefore impermissible under Supreme Court decisions, citing *Clinton* v. *Virginia,* 377 U. S. 158 (1964), reversing *per curiam* 204 Va. 275, 130 S. E. 2d 437 (1963), and *Silverman* v. *United States,* 365 U. S. 505 (1961). This was the contention made below, but Judge Palmieri found to the contrary. After the thorough evidentiary hearing, the judge concluded that "nothing has been adduced to indicate there was a physical trespass or any basis upon which the evidence should be suppressed. . . . [T]here was no illegality to the procedures followed by the agents and I therefore deny the motion [to suppress]." Appellants recognize that this court's recent decision in *United States* v. *Pardo-Bolland,* 348 F. 2d 316, cert. denied, 382 U. S. 944, 946 (1965), presents a formidable obstacle to them. In that case, similar electronic eavesdropping in a hotel room was held constitutional. Ascribing controlling effect—as the

Supreme Court has done—to the existence of a "physical intrusion" [12] in assessing the legality of electronic eavesdropping has been the subject of considerable discussion. See, e.g., Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 Colum. L. Rev. 1205, 1232-53 (1966); The Supreme Court, 1960 Term, 75 Harv. L. Rev. 80, 184-87 (1961); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 201-03 (1967). Appellants argue that *Berger* v. *New York*, 388 U. S. 41 (1967), contains language that supports the view that the type of non-trespassory eavesdropping present here is improper. However, the holding of that case is that a search that would otherwise be unconstitutional because of a physical intrusion was not cured by a court order under a statute which did not require sufficient safeguards. We are aware that these issues may again be examined closely by the Supreme Court in the near future. *Katz* v. *United States*, 386 U. S. 954 (1967) (granting certiorari; questions presented). However, we are bound by *Pardo-Bolland* and the cases upon which it relied;[13] appellants must distinguish them to prevail here.

Some appellants accept the challenge and point out that the standard of unconstitutional eavesdropping is not just technical "trespass," but "an actual intrusion into a constitutionally protected area." *Silverman* v. *United States*, 365 U. S. at 512. Therefore, they ask us to distinguish *Pardo-Bolland* on its facts. Thus, much is made of use by

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12 *Silverman* v. *United States*, 365 U. S. 505, 509 (1961).

13 With admirable candor, appellant Desist's original brief concedes that it is "futile to argue here what has been foreclosed" by the Supreme Court, and admits that much of its argument is to preserve questions for possible Supreme Court review.

the agents here of the air-space between the two doors of Rooms 1600 and 1602, while in *Pardo-Bolland* there was only a single door, and in *Goldman* v. *United States*, 316 U. S. 129 (1942), only a common wall to which the listening device was attached. Appellants emphasize that the purpose of the air-space between the two rooms was to enhance privacy; this may be so, but a single door or wall also is intended to enhance privacy. That the air-space may have improved the possibilities for eavesdropping under expanding technology—as appellants claim and we will assume *arguendo*[14]—is not constitutionally significant under Supreme Court case law.

Appellants also claim that the hotel improperly cooperated with the agents, a feature possibly present in *Pardo-Bolland*[15] but apparently not considered material there by the parties or the court. However, the testimony of Agent Schrier, which Judge Palmieri was free to accept, disposed of any contention that the hotel's management surreptitiously placed Nebbia in a particular room or kept an adjacent room available for the agents.[16] We agree that the statement in *Hoffa* v. *United States*, 385 U. S. 293, 302 (1966), referring to reliance on "the security of" a hotel suite, is suggestive but in the context of the controlling cases the limited cooperation of the innkeeper here hardly seems dispositive. The final effort to distinguish *Pardo-Bolland* is the claim of actual trespass by one of the agents,

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14 Appellants argue that the narrow air-space between the double doors separating the two rooms made the electronic installation a "parabolic mike" which invaded Room 1602's "acoustical barrier."

15 Appellant's Appendix at 22a-23a, *United States* v. *Pardo-Bolland*, 348 F. 2d 316 (2d Cir. 1965).

16 Although appellants were originally foreclosed from this line of inquiry, the matter was eventually aired at the preliminary hearing before Judge Palmieri.

who testified that he placed his ear against the door opening into Nebbia's room for a "matter of seconds" and heard nothing. One must strain to call this a "trespass" in the relevant sense; in any event, it led to nothing. Cf. *Goldman* v. *United States*, 316 U. S. at 134-35. Based upon the controlling precedents, which we find indistinguishable, we hold that there was here no "actual intrusion into a constitutionally protected area."

Apart from the variety of assaults on *Pardo-Bolland*, appellants offer additional arguments relating to the overheard conversations. Thus, they object to the use at trial of the contemporaneous tape recordings of the conversations. During the trial, there was an extensive two-day voir dire hearing, during which the tapes were played for the court and defense counsel, copies of transcripts of the tapes prepared by Agent Kiere were provided, and defense counsel were allowed to make their own copies of the recordings. At the end of the hearing, Judge Palmieri overruled all objections. Before the jury, Kiere first testified to the portions of the conversations he recalled overhearing, and then the tapes were played with Kiere translating as the tape went along. The conversations were in French; appellants requested the trial court to appoint an impartial interpreter, who would make a simultaneous translation for the jury. The trial judge, who was fluent in French, as were Kiere and one or two colleagues of defense counsel, suggested a conference to arrive at an agreed-upon translation. The defendants rejected this procedure and Kiere acted as translator for what he had heard. Appellants claim that an impartial interpreter would have buttressed their conclusion that the tapes were unintelligible; under the admitted fact that the agent spent seventy-five hours on his own to translate the forty-five

minute tape, an impartial translator, they say, became essential for a fair trial. However, appellants were given ample opportunity to cross-examine the agent or bring in their own translator to rebut him.[17] Under the adversary system, the Government was allowed to use its agent as an expert witness, and the "unfairness" appellants allege is illusory. We have carefully considered this and other contentions; we hold that Judge Palmieri committed no error in connection with the tapes.

Another attack on the overheard conversations stems from recent admissions by the Solicitor General in the Supreme Court of trespassory eavesdropping; e.g., in *Black* v. *United States*, 385 U. S. 26 (1966) (*per curiam*), and *Schipani* v. *United States*, 385 U. S. 372 (1966) (*per curiam*).[18] Appellants claim that memoranda of the Solicitor General in these cases make clear that President Johnson issued a policy statement on June 30, 1965, under which all electronic eavesdropping—trespassory or not—is prohibited without prior authorization of the Attorney General, apparently not obtained here. Appellants also suggest, *inter alia*, that:

> [I]t would be proper for this Court to request the Attorney General (or the Acting Attorney General), or the Chief Justice of the Supreme Court, to inquire of the White House (and if necessary of the President

17 Cf. *United States* v. *Gilbert*, 25 F. Cas. 1287, 1312 (No. 15,204) (C. C. D. Mass. 1834) (Story, J.).

18 See Supplemental Memorandum for the United States, *Black* v. *United States*, 385 U. S. 26 (1966) (microphone penetrated molding of petitioner's suite); Supplemental Memorandum for the United States, *Schipani* v. *United States*, 385 U. S. 372 (1966) (microphone installed by means of a trespass at place of business where petitioner and others frequently met).

himself) as to what the President said on the occasion in question.

The Government responds that the President's policy merely emphasized to all federal agencies that any electronic surveillance was to be in full compliance with the legal standards established by the courts, which regarded the fact of trespass as crucial. This argument is supported by the fact that the same Solicitor General, upon whose memoranda appellants rely, filed another memorandum in the Supreme Court in October 1966—over a year after the claimed statement of policy—in opposition to an application for bail, which defended the validity of the eavesdropping in this very case and emphasized that there had been no trespass.[19] Similarly, according to one of the memoranda of the Solicitor General cited by appellants,[20] a memorandum of the then Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarized the policy of the Department of Justice "in conformity with the policy declared by the President" as not proceeding with any investigation or case "which includes evidence illegally obtained or the fruits of that evidence."[21] The presidential policy statement is not in the record before us,

19 Memorandum for the United States in Opposition (dated October, 1966), *Dioguardi* v. *United States* (Sup. Ct., Oct. Term 1966).

20 Supplemental Memorandum for the United States at 4-5 n. 3, *Schipani* v. *United States*, 385 U. S. 372 (1966).

21 We note also that the United States Attorney for the Southern District of New York, in a Supplemental Memorandum dated February 1, 1967, filed in this court, flatly takes the position that the "policy declaration" was such a "reaffirmation" of existing law. That the United States Attorney speaks for the Attorney General in these matters in this court is evidenced by the Memorandum, filed by him February 10, 1967, in *United States* v. *Borgese*, 372 F. 2d 950 (2d Cir. 1967) (*per curiam*), admitting that evidence collected by illegal wire tapping was used at the trial in that case and suggesting a new trial.

and we do not feel that the unusual procedure appellants suggest is appropriate or that it is incumbent on the court to attempt to devise some procedure to obtain it, particularly in view of the Acting Attorney General's statement. Therefore, we will not consider further the legal effect, if any, on the courts of an internal administrative statement.

Appellants also sought a direction from this court that the Solicitor General conduct in this case a review similar to those already had in *Schipani* and *Black* to discover whether there was use of "evidence obtained in violation of a defendant's protected rights."[22] Such a review was made and on April 27, 1967 we were advised by the United States Attorney that, in addition to the monitoring at the Waldorf, there were two other instances of electronic monitoring; both involved a trespass. By orders entered in May and June 1967, we thereafter remanded the case to the district court so that the trial judge could conduct a prompt and full hearing into these and any other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring which had already been fully litigated). After a number of pre-trial conferences, Judge Palmieri held such a hearing. Fourteen witnesses testified on four separate days; various records of the Federal Bureau of Investigation were provided, and the record consumed over 800 pages of transcript.

In a thorough 37-page opinion, the judge found, *inter alia*, as follows: There was use in 1962-1963 of an electronic listening device installed by trespass in a business establishment in Miami, Florida by which conversations of

22 Supplemental Memorandum for the United States at 5, *Schipani* v. *United States*.

defendant Dioguardi were heard. However, the investigation and conversations were totally unrelated to the evidence in this case, whose principal events occurred over two years later. There was another incident involving these defendants in December 1965 in Columbus, Georgia when a listening apparatus was installed by narcotics agents in a car rented to defendant Nebbia by Avis. However, the apparatus did not function and nothing coherent was obtained. Finally, the judge considered and rejected a claim made by defendants that at the Black Angus Motel in Columbus, Georgia federal agents had obtained evidence by other illegal activities. In sum, Judge Palmieri concluded that no showing was made "that any of the evidence used against them [defendants] at the trial was tainted by any invasion of their constitutional rights." Defendants attack the judge's findings of fact and conclusions of law on various grounds. We have considered them all and do not find them persuasive.

Finally, appellants also move for an order granting permission for an electronic consultant, hired after the trial below was completed, to inspect and listen to the tape recordings used at trial. The principal ground advanced for the motion is that the consultant might somehow be able to demonstrate that the tapes were a product of trespass. However, the suggestion of trespass was adequately explored by the trial court, and we see no basis for allowing the issue to be relitigated because defense counsel, as they concede, "simply 'missed' several meanings of the agents' testimony" before Judge Palmieri which they now "perceive." Accordingly, we hold that the evidence at trial of conversations at the Waldorf-Astoria was admissible.

V. Refusal to Appoint an Interpreter

Appellant Nebbia contends that he was denied due process and a fair trial, as well as the rights of confrontation, presence at his trial, and effective assistance of counsel, by the trial judge's refusal to provide him at government expense with a court-appointed interpreter to render simultaneous translation of the proceedings.[23] It is not seriously disputed that Nebbia understands French but does not understand English well, if at all. He first asked for a translator without expense to himself during a pre-trial conference; the request was specifically not based on indigency—a position consonant with Nebbia's ability to post $100,000 within a few hours at an earlier stage of the proceeding, see *United States* v. *Nebbia*, 357 F. 2d 303 (2d Cir. 1966). The question Nebbia poses, therefore, is whether a defendant has an absolute right to a free simultaneous translator.[24]

There is surprisingly little discussion of the issue in the cases. The Supreme Court has not ruled on the question, cf. *Felts* v. *Murphy*, 201 U. S. 123 (1906), although it has held that appointment of an interpreter when the defendant was testifying was discretionary with the trial judge, *Perovich* v. *United States*, 205 U. S. 86, 91 (1907). However, the discretion appeared related to evaluation of the defendant's ability to understand the interrogation and express himself in English. This court has apparently ruled on interpreters in criminal cases only rarely[25] and not on

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23 The other appellants contend that they were also prejudiced, but that claim is not impressive.

24 See also *Ex Parte Roelker*, 20 F. Cas. 1092 (No. 11,995) (D. Mass. 1854).

25 *United States* v. *Guerra*, 334 F. 2d 138, 142-43 (2d Cir.), cert. denied, 379 U. S. 936 (1964); *United States* v. *Paroutian*, 299 F. 2d 486, 490

the point here involved. The cases in this circuit and elsewhere have dealt in the main with the competence of the particular interpreter used[26] or whether there really was a language barrier,[27] particularly if, as in *Perovich* v. *United States*, *supra*, the defendant testified and the problem was whether he could adequately convey his thoughts to the jury.[28] That issue differs somewhat from the right to have a personal interpreter give a simultaneous translation of what is being said in the courtroom.[29] In *Tapia-Corona* v. *United States*, 369 F. 2d 366 (9th Cir. 1966) (*per curiam*), the court held that a Spanish-speaking defendant was not entitled to "have all English testimony . . . instantly interpreted to him" in view of the fact that "[t]he official Spanish interpreter sat at the defense counsel table and was available for immediate consultation." However, to the extent that the case impliedly recognizes at least a right to an "official" interpreter, it is helpful to Nebbia; but it is not clear from the opinion in that case whether appellant was indigent. See also *Chavira Gonzales* v. *United States*, 314 F. 2d 750, 752 (9th Cir. 1963).

A number of serious weaknesses in Nebbia's legal position emerge from the record. Thus, facilities available to

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(2d Cir. 1962); cf. *Barber Asphalt Pav. Co.* v. *Odass*, 85 F. 754, 756 (2d Cir. 1898).

26 E.g., *Thiede* v. *Utah*, 159 U. S. 510, 519-20 (1895) (use of juror as interpreter held not prejudicial); *United States* v. *Guerra*, *supra* note 25; *Lujan* v. *United States*, 209 F. 2d 190, 192 (10th Cir. 1953); *United States* v. *Gonzales*, 33 F. R. D. 276, 279 (S. D. N. Y. 1958).

27 *Pietrzak* v. *United States*, 188 F. 2d 418, 420 (5th Cir.), cert. denied, 342 U. S. 824 (1951).

28 *Suarez* v. *United States*, 309 F. 2d 709, 712 (5th Cir. 1962); cf. *Kane* v. *American Tankers Corp.*, 219 F. 2d 637, 641 (2d Cir. 1955).

29 See *Gonzales* v. *Virgin Islands*, 109 F. 2d 215, 217 (3d Cir. 1940) (assuming *arguendo* constitutional right, but finding no inability to understand English).

him during the proceedings below included a French-speaking partner in the law firm retained by him and its employees or contacts.[30] Moreover, even though trial counsel was not fluent in French, Judge Palmieri stated, after the trial, that from his own observation he had no doubt that Nebbia had been sufficiently in communication with trial counsel to permit the latter "to conduct a vigorous and able defense in [Nebbia's] behalf."[31] In addition, in the posture the issue comes before us, we must assume—and it is a reasonable assumption—that Nebbia was quite able to afford an interpreter and to find a qualified one. Under these circumstances, if the real point is guarantee of a fair trial, it is a little difficult to see why Nebbia is not required to lie in the bed that he made. We are aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia's ability to remedy that situation dissipates substantially—perhaps completely—any feeling of unease. In other words, if Nebbia denied himself the interpreter and stands on his right to do so, does not the issue become solely who should have paid for one?[32] Moreover, we doubt that Nebbia's claimed absolute constitutional right to an interpreter is stronger than the

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30 The French Embassy originally asked the firm to represent Nebbia.

31 Although Judge Palmieri accepted counsel's representation that he was not conversant in French, the record clearly shows that the judge believed the defense was not hindered by a communication barrier.

32 At one point in the pre-trial hearings on eavesdropping, the Government provided an interpreter whose services were used for an entire day. At the beginning of the next day, Nebbia's counsel stated "I want to be certain that this is not going to be an expense incurred by the defendant"; when told that defendant would have to pay, counsel "disassociated" himself from the interpreter.

Indeed, the suggestion made here—but apparently not in the trial court—is that the trial judge should have appointed an interpreter and required Nebbia and the Government to abide the outcome of the case to determine who would pay for the interpreter's service. Cf. 28 U. S. C. §1918(b).

absolute right to a court-appointed counsel; the latter is held only by the indigent, *Gideon* v. *Wainwright*, 372 U. S. 335, 339-40 (1963); *United States* v. *Arlen*, 252 F. 2d 491, 495 (2d Cir. 1958). See also *Cervantes* v. *Cox*, 350 F. 2d 855 (10th Cir. 1965).[33] From Nebbia's point of view, we think the most persuasive approach is the point made at oral argument that if the Government chooses to prosecute someone, the burden rests upon it to furnish the basic apparatus for intelligible and minimally comfortable proceedings, e.g., the physical accoutrements of a trial, such as a stenographer or even the courtroom itself, neither of which is billed to the defendant. Indeed, a full-time interpreter is now provided by the Government in the District Court of Puerto Rico at apparently no expense to any defendant who needs one.[34] This undoubtedly reflects a judgment that the need for an interpreter in that district is so great that sound administrative principles require that one be available at all times. However, to elevate this resolution of a local problem to the status of a constitutional requirement for all districts and all defendants and all languages is another matter.

Appellants also rely on Fed. R. Crim. P. 28(b), which provides:

> *Interpreters.* The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

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33 The Criminal Justice Act of 1964, 18 U. S. C. §3006A(e), provides that payment for services "necessary to an adequate defense" shall be directed by the court out of appropriated Treasury funds, upon a finding "that the defendant is financially unable to obtain them."

34 1966 Jud. Conf. Rep. 59.

The rule was approved by the Supreme Court on February 28, 1966, and was reported to Congress on the same day. 383 U. S. 1088-89. The Court's order provided that the rule "shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending." *Id.* at 1089. By July 1, the trial was well under way, and for all that appears in the record the rule was first mentioned on July 7, when the trial judge and appellants' counsel stipulated that appointment of an interpreter at that point —as the judge offered—could not cure any error which might have been committed earlier. We agree, of course, with the stipulation. The Government urges that the rule could not have been used by Judge Palmieri because it only applies to indigents,[35] and, in any event, did not go into effect until over two weeks after the trial started. Although we note as to the former argument that the rule is not so limited by its text, and as to the latter that another recent rule amendment has been applied retroactively,[36] we need not deal with these questions. Assuming *arguendo* that the court had the power to appoint an interpreter, the question was still one of discretion. Although the judge did have grave doubts as to his power, we note that among the factors also influencing him were Nebbia's ability to get and pay for an interpreter of his own choice, the avail-

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35 For this interpretation, the Government relies on part of the note of the Advisory Committee:

> General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communication with *assigned* counsel. [Emphasis added.]

36 *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967).

ability of French-speaking partners of his trial counsel, and Nebbia's ability to communicate with defense counsel. It is true that Judge Palmieri did offer to appoint an interpreter after the concededly effective date of the Rule. However, whether he would have done the same thing before the trial started, weeks before that effective date, if the Rule had been raised by defendants is another matter. We are not convinced that he would have, and, in any event, would not consider failure to do so under these circumstances an abuse of discretion.

We have considered the question carefully; taking all of the factors mentioned above into account, we hold that the failure to appoint a simultaneous interpreter at the Government's expense was not reversible error.

VI. Miscellaneous

Appellants' remaining contentions do not require extensive comment. Appellants complain of allegedly improper publicity; shortly after commencement of the trial, an article appeared in a New York City newspaper describing Dioguardi as follows: "Frank Diaguardi [*sic*] 42, identified by the Government as an underworld figure here." The defendants requested a hearing to determine if the Government had supplied the information attributed to it. Judge Palmieri inquired of the two prosecuting attorneys, who denied giving the information; decision on the motion for a hearing was reserved. The judge later satisfied himself that no juror had read the article.[37] However, appellants claim that a hearing should have been held on whether the Government had, in fact, "leaked" the information. Citing *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), they

37 Appellants do not claim to the contrary.

argue that a prophylactic rule is called for, turning not on prejudice to a defendant, but upon "the honor of the sovereign." But cf. *Chapman* v. *California*, 386 U. S. 18 (1967). We are most aware of the Supreme Court admonition in *Sheppard* that (384 U. S. at 363):

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

However, since prejudice was neither demonstrated here nor probable—and is indeed not even claimed[38]—we do not read *Sheppard* as requiring that the convictions be vacated. *United States* v. *Armone*, 363 F. 2d 385, 393-96 (2d Cir.), cert. denied, 385 U. S. 957 (1966); *United States* v. *Bowe*, 360 F. 2d 1, 12 n. 9 (2d Cir. 1966), cert. denied, 385 U. S. 961 (1966). However, we do not think that "identification" by a government employee of a defendant in the midst of a criminal trial as "an underworld figure" is an incident to be taken lightly, if it occurred.[39] Therefore, in future similar situations, we would regard as desirable the holding of a hearing by the district court at a convenient time to find out who, if anyone, spoke for the "Government," so that proper measures could be considered, e.g., transmittal of the hearing transcript to the appropriate bar association

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38 We note but need not consider that the newspaper reference complained of was only to Dioguardi, but the point is pressed also by Desist.

39 Cf. Special Committee on Radio, Television & the Administration of Justice (Judge Harold R. Medina, Chairman), Ass'n of the Bar of the City of New York, Freedom of the Press and Fair Trial, Final Report with Recommendations 14-26 (1967).

or to the employee's supervisor. We, of course, do not suggest that the two attorneys directly asked by the trial judge furnished the information, in view of their denials in open court.

Finally, objection is made to the manner in which Judge Palmieri handled a communication from the jury. During its deliberations, the jury sent in the following note:

> We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's restaurant.

These agents had testified to the crucial conversation discussed above between Dioguardi, Sutera and LeFranc in Adano's Restaurant on the night of December 17. Thereafter, the judge had a good portion of the agents' testimony read to the jury. However, he refused appellants' request that there also be read the bulk of the cross-examination of the agents, principally dealing with their ability to hear what they said they heard. The judge ruled that this was not the agents' "testimony as to what was overheard." Interpretation of the note was clearly a matter of discretion; while it could have been read more broadly, the trial judge's construction was not unreasonable. Under these circumstances, we find no error in his ruling.

We have considered the other contentions made by appellants in this court and find them without merit. The judgments are affirmed and all motions not already disposed of are denied.

APPENDIX B

(Filed—August 30, 1967.)

CR 101-A OPIN 397
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
66 Cr.

UNITED STATES OF AMERICA

—against—

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Defendants.

Appearances:

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Appendix B

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PALMIERI, J.

PRELIMINARY STATEMENT

This case, presently *sub judice* before the Court of Appeals after a trial completed before this Court on July 11, 1966, was remanded by order of that court dated May 29, 1967, "so that the trial judge may conduct a prompt and full hearing to ascertain the Government's use of electronic equipment on the occasion referred to on page 2 of the * * * letter from the United States Attorney" dated April 27, 1967, addressed to the Clerk of the Second Circuit.[1] The letter of the United States Attorney[2] refers to two instances of electronic eavesdropping: (1) One took

[1] The order of the Court of Appeals is reproduced as an appendix hereto.

[2] This letter, in full, is reproduced in the appendix hereto.

place on Columbus, Georgia, on December 18, 1965 (the Avis car rental incident), and provided no evidence of any kind since the equipment malfunctioned, and (2) the second took place between April 25, 1962, and April 1, 1963, and consisted of an electronic listening device used in a business establishment in Miami, Florida (the Casa Maria-Dorey surveillance). This will be discussed fully.

In its order the Court of Appeals directed that "at such hearing the district court will confine the evidence presented by both sides to that which is material to questions of the content of any electronically eavesdropped conversations overheard on these occasions, and of the relevance of any such conversations to petitioners' subsequent convictions". On June 14th the Court of Appeals handed down a supplementary order of which counsel were advised at a conference held on June 14th.[8] The order stated, in substance, that the defendants were to be allowed "to explore, in addition to the incidents described in the letter of April 27, 1967 to the Clerk from the United States Attorney, the question of whether any governmental personnel engaged in any other electronic eavesdropping of any other kind which related to this case. . . ."

At conferences between Court and counsel on June 19th and July 6th, defendants' counsel repeatedly urged that they be given additional time to complete their investigation and on a number of occasions requested the production of approximately 40 witnesses, many of them law enforcement officers of high echelon. After lengthy discus-

[8] Conferences between Court and counsel were held on June 7, 1967, and again on June 14th, with a view to setting dates for the evidentiary hearings, settling questions of representation and arranging for the appearance of the defendants at the hearings.

sion with counsel, the Court requested the presence of the supervising agent in charge of the Miami, Florida, office of the Federal Bureau of Investigation and the narcotics agent in charge of the investigation of the case in the Atlantic-Columbus area. These witnesses, agents Swinney and Matuozzi, were called as a matter of caution, in order to complete the proof adduced by the Government with respect to the Casa Maria-Dorey surveillance and the Avis car rental incident. In both instances the evidence indicated that there was no relationship whatever between the incident and the proof adduced against the defendants in this case.

The Casa Maria-Dorey incident related to an investigation by the Federal Bureau of Investigation through its Miami office, which was totally unrelated to any of the evidence in the case. It developed that the defendant Dioguardi participated or appeared to have participated in some of the conversations which were overheard. However, nothing that was said by Dioguardi, and no reference made to him in any of these conversations, had any possible relationship to the evidence in this case. Clerks of the Federal Bureau of Investigation listened to tapes of these conversations and transcribed notes of them. The transcribed notes were quite voluminous and were marked in evidence at the hearing. (Government's exhibits 102 and 103.) However, only the relevant portions, that is, those portions relating to the defendant Dioguardi, were revealed to counsel (Government's exhibit 103.) These were the portions which reported the conversations in which he participated or the conversations in which it was believed he was one of the speakers. The portions which were not revealed to counsel (Government's exhibits 100 and 102) were ordered sealed by the Court and have been preserved for appellate scrutiny.

Appendix B

These transcribed notes indicate that there was no relationship between the eavesdropping and the evidence in this case. Indeed they proceeded the events to which this case related by approximately two years.

The Avis rental car episode took place in Columbus, Georgia, on December 18, 1965, shortly before the arrests of the defendants and the heroin seizure which led to the indictment in this case. On this occasion, an apparatus was installed in an automobile rented to the defendant Nebbia by the Avis car rental agency. Through this apparatus the narcotics agents engaged in surveillance of Nebbia hoped to overhear conversations between Nebbia and his co-conspirators. The apparatus did not function. It gave only static and unintelligible noises from which no evidence could be secured. In addition, it should be pointed out that the defendant Nebbia customarily spoke in French. The only French-speaking agent seeking to listsen in on the conversations was Agent Kiere, who testified at length at the trial and also testified at the hearing before this Court on June 26, 1967. His testimony as well as corroborating testimony by Agents Waters, Matuozzi and Selvaggi, provided clear and persuasive proof that the apparatus did not function and that nothing coherent was obtained.

The only other episode related to eavesdropping on conversations in the room occupied by the defendant Nebbia at the Waldorf-Astoria Hotel in New York City between December 14-18, 1965. This eavesdropping was much bruited at the trial and was fully explored by the defendants both at trial and at *in camera* hearings during the trial. This matter is the subject of review in the appellate proceedings and needs no elaboration here since this episode was not deemed to be within the purview of the broadened frame of reference as set forth in the order of the

Court of Appeals of June 14, 1967. For these reasons the defendants were not permitted to re-explore the Waldorf-Astoria eavesdropping episode.

In sum, there is no persuassive evidence before this Court that defendants' rights were impinged upon in any way by any electronic eavesdropping activities of the government agents.

The defendants were given whatever time they requested to complete their investigation and a full opportunity to present evidence indicating a violation of their rights. Evidentiary hearings were held before the Court on June 26, July 11 July 18 and July 25. The government witnesses, whether called by the defense or produced by the Government on his own initiative, or at the Court's request, all proved to be accurate and reliable witnesses, and they supported in various ways the conclusion above stated.

Subsequent to the Court of Appeals' order of May 29, 1967, the defendants hired an investigator, one John G. (Steve) Broady. As a result of his efforts he interviewed and obtained as defense witnesses two men of advanced years, Mr. Charles B. Brown, former night manager of the Black Angus Motel at Columbus, Georgia, and Mr. Oscar H. Kennington, who is still employed as the day manager at the motel. They testified before this Court on July 18, 1967. Their testimony, construed in the light most favorable to the defendants, would indicate that part of the Government's proof in the principal case was derived from electronic eavesdropping, separate and apart from the Waldorf-Astoria surveillance; that there had been a search of defendant Desist's room by narcotics agents at the Black Angus motel; and that a telephone conversation by Desist in a foreign language, presumably French, had been overheard at the motel switchboard by narcotics agent Waters.

Appendix B

The testimony of Brown and Kennington was seriously impunged by the Government as a matter of accuracy and several narcotics agents expressly contradicted its purport.

The written statements purported to have been given by Brown and Kennington to Broady (defendants' exhibits G and H for identification) were used to refresh their recollection and as a basis for impeachment. In a number of instances the written statements appeared to be more favorable to the defendants than the testimony which Messrs. Brown and Kennington gave at the hearings. These statements were not accepted by this Court as independent proof of any probative value apart from the testimony of the witnesses. (See conclusion of law No. 4.) Indeed the defendants in their brief before this Court come very close to questioning the credibility of these witnesses, saying that "the dispositive formulation of the credibility question at this time (as to Brown and Kennington) is not whether through their testimony the defendants have proved unconstitutional electronic eavesdropping, but whether a sufficiently probative indication thereof has been achieved to justify allowing the defendants a further opportunity for more or less plenary hearing."[4] This statement, standing alone, is more pettifogging than persuasive.

The Court was frequently confronted by defense demands for procedures which would have amounted to a grandiose fishing expedition. Apparently unmindful of the burden resting upon the accused attacking the propriety of evidence to establish the fact that such evidence was illegally obtained (see conclusion of law No. 5); the defendants sought to make the hearing a continuing exploration of massive breadth, a grand inquest. Had such exploration

[4] Defendants' brief, p. 22.

been pursued, it would have consumed a very considerable amount of time, to say nothing of the expense to the Government and the serious inconvenience to this Court and to many government agencies.

However, the Court did give both sides the fullest opportunity to present any evidence they wished.[5]

The Government's proof was forthright and persuasive and established beyond any possible doubt that the evidence against each of the defendants in this case was not tainted. The Assistant United States Attorney in charge of the trial, Mr. William Tendy, was called by the defendants and examined under oath. His testimony alone, coupled with the reasonable inferences to be drawn from it, establishes that no eavesdropping evidence of any kind was used against any defendant in the case, except the carefully examined Waldorf-Astoria surveillance of December, 1965, which is part of the trial record. The defendants have not sought to impung Mr. Tendy's testimony. Further, it was forcefully corroborated by the twelve government witnesses who testified at the hearings. In the second *Nardone* case,[6] famous because of the "fruit of the poisonous tree" doctrine, Mr. Justice Frankfurter stated:

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that

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[5] Although the last evidentiary hearing took place on July 25, 1967, it became necessary to await the transcription of the minutes and the submission of the briefs before the matter could be deemed to be fully submitted. Despite the allowance of a schedule in accord with the defendants' wishes, and extensions of time within that schedule, the case was not, in fact, fully submitted until August 25, 1967.

[6] *Nardone* v. *United States,* 308 U. S. 338, 341-42 (1939).

> wiretapping was unlawfully employed and that claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury."

Here, far from supporting their claims upon any solid basis, the defendants have put forward nothing better than conjecture or surmise, while the Government's proof is clear and persuasive that no portion of its case was tainted by any invasion of the defendants' constitutional rights.

The findings of fact and the conclusions of law which follow are set forth in amplification of what has already been said and are intended to demonstrate that there were no eavesdropping incidents of any kind, other than those mentioned, and that none of them tainted the evidence against any of the defendants.

Findings of Fact

Casa Maria-Dorey Surveillance

1. From April 25, 1962 to April 1, 1963, an electronic eavesdropping device was maintained at a business establishment, known variously as the Casa Maria Restaurant or Dorey's, and located at 150 Sunny Isle Boulevard, Dade County, Florida. The manner in which this surveillance came to the attention of the prosecuting officers in this case after the conclusion of the trial was as follows:

Pursuant to the review procedure initiated by the United States Department of Justice in *Schipani* v. *United States* (see finding of fact 19, *infra*), the Assistant Attorney General, Criminal Division, by memorandum dated Jan-

uary 12, 1967, requested the Director of the Federal Bureau of Investigation to ascertain the nature and extent of any electronic surveillance of any of the defendants in this case. This request was forwarded the same day to Special Agent J. Wayne Swinney of the Miami office of the Federal Bureal of Investigation, supervisor of the criminal intelligence program in the geographical jurisdiction of the Miami office and in charge of the electronic surveillance activities of that office. Agent Swinney was requested to ascertain whether any of the defendants were overheard on any electronic device in the Southern Judicial District of Florida. In response, Special Agent Swinney forwarded the complete logs of the Casa Maria-Dorey surveillance to the United States Department of Justice.

2. The Government conceded that the Casa Maria-Dorey surveillance was achieved by trespass.

3. The Casa Maria-Dorey electronic surveillance was not directed against any of the defendants in this case, nor did it lead in any way to any Federal law enforcement activity involving any of them. Its subject was one Ricci, an individual totally unrelated to this prosecution.

4. On the following dates in 1962, the defendant Frank Dioguardi was positively identified as a participant in the conversations or activities overheard by the Casa Maria-Dorey surveillance:

October 12 (GX 2)*
October 14 (GX 10)

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* The prefix "GX" refers to the Government's Exhibits introduced at the hearings.

October 30 (GX 11)
November 2 (GX 5)
November 4 (GX 12)
November 6 (GX 6)
November 7 (GX 7)
November 8 (GX 8)
November 30 (GX 9).

5. On several other occasions in 1962, the defendant Frank Dioguardi, although not positively identified, was thought to be a possible participant in the conversations or activities overheard by the Casa Maria-Dorey surveillance. These occasions were:

September 12 (GX 1)
October 26 (GX 3)
November 1 (GX 4).

6. At no time were any of the other defendants participants in any conversations or activities overheard during the Casa Maria-Dorey surveillance.

7. Following regularly established office procedure, the conversations or activities overheard by the Casa Maria-Dorey surveillance on the dates specified in findings of fact 4 and 5 were monitored by clerks in the employ of the Federal Bureau of Investigation, in Miami, Florida. The clerks recorded the activities or conversations overheard on daily logs. The time of the occurrence, and the initials of the auditor were also recorded.

When the matter overheard did not appear pertinent, only handwritten notes were taken, and were summarized on the log sheets (*e.g.*, the weather; the price of automobiles). Any uncertainty was to be resolved in favor of

relevance. The summary would be based solely upon what was overheard and would not contain any other material.

Where relevant information was revealed the handwritten notes were supplemented by a tape recording of the conversation. Later the clerks would replay the tape, and, comparing it with the handwritten notes, would attempt to obtain a verbatim transcript of the conversation which would then be entered in the log. As soon as the log sheets were typed, the handwritten notes were destroyed pursuant to the regular procedure.

Any tapes resulting from the installation were retained for a period of seven days and then erased pursuant to the regularly established office procedure. None of the tapes resulting from the Casa Maria-Dorey installation were retained beyond a seven-day period and were all erased no later than April 8, 1963.

The logs comprise the most complete record kept by the Federal Bureau of Investigation of the conversations and activities overheard by the Casa-Maria Dorey installation.

8. All of the log sheets resulting from the Casa Maria-Dorey surveillance were produced for the Court's inspection and marked GX 100. The Court has examined all of the log sheets comprising GX 100 and finds that the only defendant overheard during the Casa Maria-Dorey surveillance was Frank Dioguardi, who was overheard only on the dates specified in findings of fact 4 and 5.

9. The complete log for each of these days was collated and collectively marked GX 102. The specific portion of each of the logs pertaining to Dioguardi were bracketed in ink on GX 102 and separately collated as GX 103.

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(Copies of GX 103 [GX 103-A, -B, -C, -D] were furnished to defense counsel on June 21, 1967, five days prior to the taking of any testimony, as well as during the taking of testimony. In addition, GX 103 was later introduced as a Government Exhibit.)

After *in camera* examination, the Court finds that GX 103 truly comprises all those portions of GX 100 and 102 in which any defendant in this case was a participant or a possible participant. The Court order GX's 100 and 102 sealed for appellate review. There is no relevant connection between any of the remaining material and any of the defendants, this prosecution, or the issues of this hearing.

10. None of the conversations or activities recorded in GX 1 through 12, and GX 103, has any relevance to any of the evidence introduced at the trial or the subsequent conviction of any of the defendants.

11. No electronic surveillance of any kind [either by trespass or without trespass] other than that described in findings of fact 1 through 5, was conducted by personnel of the Miami office of the Federal Bureau of Investigation against any of the defendants in this case or which related to or affected this case.

12. At the time of the trial the office of the United States Attorney for the Southern District of New York had no knowledge of the Casa Maria-Dorey surveillance nor of the contents of the logs.

The Avis Car Rental Incident

13. On December 18, 1965, in Columbus, Georgia, agents of the Federal Bureau of Narcotics installed an electronic

listening device in a yellow Plymouth automobile owned by the Avis Rent-a-Car System. Later that day the automobile was rented by the defendant Jean Nebbia.

14. At various times the defendants Jean Nebbia, Jean Claude LeFranc and Samuel Desist were present in the automobile.

15. The listening device malfunctioned, gave only static noise, and revealed no intelligible sounds. Therefore no recordings were made, no notes were taken and no reports were prepared.

16. The use of the electronic listening device was totally abandoned during the early morning hours of December 19, 1965, when surveillance of the subjects was discontinued. When visual surveillance was resumed later that morning by agents of the Federal Bureau of Narcotics it was undertaken in a different automobile. The agents did not use or attempt to use any listening device in the new automobile.

17. No electronic surveillance of any kind, except that described in findings of fact 13 through 16, and that conducted at the Waldorf-Astoria was conducted by agents of the Federal Bureau of Narcotics during the investigation of the crime charged in the indictment or which affected or related to the case.

18. The office of the United States Attorney for the Southern District of New York had no knowledge of the installation of the device in the Avis-Rent-A-Car automobile at the time of the trial.

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The Results of the Investigative Procedures Initiated by the Schipani case Demonstrate Absence of Tainted Evidence in this Case.

19. Pursuant to the review procedure initiated by the United States Department of Justice, see *Schipani* v. *United States,* No. 504, Oct. Term 1966, Assistant Attorney General Vinson, in charge of the Criminal Division, requested by letter to David C. Acheson, Esq., the Special Assistant (for Enforcement) to the Secretary of the Treasury, that the following information be furnished regarding all pending prosecutions for violations of the Federal Narcotic Laws:

"(a) whether any of the individuals were subject to electronic surveillance by the investigating agency;

"(b) if any were, did the electronic surveillance consist of wiretapping or an electronic eavesdropping device;

"(c) if the latter, please advice us of the method of entry utilized in the placement of the device;

"(d) when, by date, did the electronic eavesdropping take place and where did it occur, that is, at the individuals home, office, or other location;

"(e) whether the named individuals appear to be present at, or participating in, conversations overheard by an electronic device which are reflected in any recordings, transcripts, logs, notes, memoranda, or other records of any such device;

"(f) if so, and if such recordings, transcripts, logs, notes, memoranda and other records still exist, would you please make them available to us;

"(g) did the information from any such device appear directly or indirectly in reports made in reference to the individuals by the agency. If so, would you please advise us of the reports in which such information apeared and furnish us with copies of these reports if you have not already done so;

"(h) if any information was obtained from electronic surveillance, to your knowledge was such information communicated in any manner to any other Federal agency;

"(i) if so, to whom was the communication made, when was it made and what is the nature of the information communicated." (GX 16)

The purpose of the Department of Justice inquiry was to determine "whether electronic surveillance was used in the investigation and, if so . . . the details of such surveillance." Mindful of the "heavy obligation resting upon us," Mr. Acheson made specific the breadth of the investigation in a communication to the Commissioner of Narcotics:

"It is essential that we provide the Department of Justice with reliable accurate information, so that a reliable and accurate evaluation of the prosecution can be made by that Department. A corollary of this is that your Bureau's inquiry into the circumstances of each of these cases must be penetrating and must go back to the supervisors and agents familiar with the cases. In some cases evidence may have been turned over to your investigators by other Federal, state or local enforcement agencies, and in such case the inquiry must go to those sources of information."

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In turn, the Commissioner of Narcotics made inquiry of each district office in the Federal Bureau of Narcotics as to the use of electronic surveillance equipment.

On December 30, 1966, John G. Evans, District Supervisor for District No. 6, whose geographical jurisdiction embraces both Atlantic and Columbus, Georgia, informed Narcotics Commissioner Giordano of the following:

> "1. On December 18, 1965, at Columbus, Georgia * * * a 'bugging' device was installed by narcotics agents on an Avis Rent-a-Car prior to its rental to Jean Nebbia and Samuel Desist after their arrival at Columbus, Georgia, from New York by plane. * * * No information was obtained, however, due to apparent malfunctions and static interference.
>
> There were no other instances in this District in which 'bugging' equipment was used which involved trespass.
>
> "2. There were no instances in this District during the period January 1963 to date in which 'bugging' equipment was used which did not involve trespass.
>
> * * *
>
> "4. There were no instances in this District during the period January 1964 to date in which wire taps were placed, or participated in, by narcotic agents."

On January 19, 1967, Deputy Commissioner of Narcotics, George H. Gaffney, made a written report to Assistant Attorney General Fred M. Vinson, Jr., concerning the "electronic surveillance * * * used in the investigation of Jean Nebbia, Samuel Desist, et al. and * * * the details of such surveillance." The report contained the following:

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"(a) On two separate occasions, and at two different locations, electronic surveillance was employed during this investigation. In one instance, a device was used to record conversations in a hotel room, and in the other case, to monitor conversations in a rented automobile.

(b) In both instances, the electronic surveillance consisted of utilizing eavesdropping devices *and not wire tapping equipment.*

* * *

(d) On the first occasion, on December 14, 1965, narcotics agents secured room 162 of the Waldorf-Astoria Hotel, New York, which was adjoining room 1600 occupied by Jean Nebbia. A narcotic agent placed a Shure Brothers microphone (Model MC-115) at the bottom of the connecting door between rooms 1600 and 1602. The microphone was placed on the side of the door located in room 1602 occupied by the agents. No physical penetration was made into the room occupied by Jean Nebbia. This microphone was connected to a Concord tape recorder, and all sounds coming under the door from room 1600 were recorded.

In the other instance, on December 18, 1965, at Columbus, Georgia, after it was learned that Jean Nebbia and Samuel Desist had made arrangements to rent an automobile from Avis Rent-A-Car, narcotic agents placed a radio transmitter in an Avis car, which was subsequently rented to Nebbia. No physical trespass was made into the car during the tenure of rental by Nebbia.

"(e) In the first instance, conversations by Jean Nebbia were monitored by a narcotic agent, recordings were made, and reports were prepared.

In the second instance, the radio device in the rented car did not function properly; no conversations were intelligible, and no recordings were made. Accordingly, no notes were taken, no recordings were made and no reports were prepared.

• • •

"(h) The information in the first instance was furnished to the United States Attorney. Since nothing was gained as a result of the second incident, no other Federal agency was advised of the attempted eavesdropping."

Testimony of Activities at the Black Angus Motel

20. The Court finds the testimony of Agents Kiere, Benjamin, Waters, Matuozzi and Selvaggi to be forthright and persuasive. (Findings of fact 13-18.) It is neither damaged nor diluted by the testimony of Oscar Kennington and Charles B. Brown.

The Court has carefully appraised the testimony of these two defense witnesses, considering its nature and substance, its consistentency and contradictions, the witnesses' age, demeanor and ability to recollect past events. Viewed most charitably, this testimony does not rise to the level of credible evidence.

A. The Testimony of Oscar H. Kennington

Oscar H. Kennington, a 60 year old former traveling salesman for headache powder and beer, was, in December,

1965, the day manager of the Black Angus Motel in Columbus, Georgia. His testimony concerning a purported overheard conversation on Monday, December 20, 1965, was marked by confusion, as he himself admitted, by an inability to accurately recall the events, the recurrent need to refresh his recollection, and by inconsistencies with his own prior written statement given only the day before.

Kennington testified that during the afternoon of Monday, December 20, 1965, he was invited to the agents' motel room to observe the seized narcotics, and "was thrilled over the stuff, I mean over putting my hand over all that much—." He then described a conversation he purportedly had with a person in the room whom he was unable to identify. In response to Kennington's inquiry as to how the narcotics were smuggled into the United States, this unidentified person allegedly said: "It was brought in in a deep freeze, in the walls of a deep freeze, and on the way down from Atlantic, we kept in touch with him through conversation . . . ." Apparently unsatisfied with the answer, counsel for the defendants attempted to refresh Kennington's recollection. In response, Kennington denied that anything was said about a radio transmitter in a car. When Kennington was shown his prior written statement given the day before to John G. (Steve) Broady, the defendants' investigator, he concluded, after considerable vacillation by saying, "I assume it was a radio transmitter." When asked whether his prior written statement refreshed his recollection Kennington twice responded only that it was refreshed to the extent of the agents having said they followed them. He concluded with the statement: "Well, the only thing I could say that they said they got a lot of information following them around, and that is as definite as

I can speak."[7] A portion of Kennington's prior statement which was inconsistent with his testimony was then read into the record.

When Kennington resumed the stand after the luncheon recess, he stated that he wished to "change" one item of his earlier testimony. After giving several different versions of his prior testimony and the desired "change", he finally testified: "I heard them say they had a transmitter in the car, but now they were not talking to me directly, sir." This was in contradiction to his morning testimony specifically denying that the agents had stated they had a transmitter in the car. When questioned by the Court, Kennington testified that he specifically heard mention of the word radio transmitter and attempted to explain the inconsistency by stating, "Well, I am a little confused, sir."

The accuracy and truthfulness of Kennington's testimony are further clouded by his testimony on both direct and cross-examination that he saw Desist and checked him out of the motel on Monday, December 20. This was a physical impossibility since Desist was observed taking a Pan American flight from Paris, France, at 9:50 p.m. the previous evening, Sunday, December 19, at Kennedy International Airport in New York.

B. The Testimony of Charles B. Brown

Similar inaccuracies and confusion characterized the testimony of Charles B. Brown. Brown, a 66 year old, former tugboat and steamboat captain, was the night manager of the Black Angus Motel in December, 1965.

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[7] P. 99, transcript of July 18, 1967.

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A portion of Brown's testimony related to an incident in December, 1965, when he attempted to permit the narcotics agents to overhear on an extension a telephone call Desist received while at the Black Angus. Brown initially testified the incident occurred on Sunday evening, December 19, after he came on duty at 7:00 p.m. On cross-examination he fixed the time as between 7:00 and 9:30 p.m., Sunday evening, December 19. On further cross-examination he retracted his prior testimony and testified that this telephone incident occurred on Sunday morning, December 19. When questioned by the Court, he admitted that he could not recall when the incident took place. However, after being shown his prior written statement, a portion of which was read into the record, he testified in conformity with it that the incident occurred on Sunday evening at 8 o'clock.

In addition to Brown's confusion as to date, it is clear that Agent Waters did not overhear any portion of the conversation. Brown testified that the conversation had ended when he handed the receiver to the agent and that the agent held the receiver only a "few short seconds." He further testified that the conversation was in French. Agent Waters testified that he did not speak French.

Brown further testified that on Saturday, December 18, 1965, he gave Agent Waters the key to Desist's motel room. Although unable to observe the door of Desist's room, Brown testified that he observed the agents go and return to the building which contained it. Brown stated that the agents returned in "a minute and a half or two minutes" and told him only that "he is the man." Brown then twice denied that the agents had told him that they had examined Desist's room. Even after counsel attempted to refresh his

recollection, Brown continued to deny that the agents had said anything about examining the contents of the room. It was only after Brown examined his prior written statement that he answered "yes" to a leading question as to whether the agents had said "they had examined the contents of the room."

Both Agents Waters and Selvaggi, when subpoenaed and questioned by defense counsel, denied having ever entered Desist's motel room. In view of Brown's inability to observe the agent enter the room, and the unreliable nature of his testimony, the Court credits the testimony of Agents Water and Selvaggi, as well as Matuozzi, and finds that at no time did the agents of the Federal Bureau of Narcotics enter Desist's motel room.

Nor does Brown's vague testimony that while occupied with other duties, he overheard a conversation that the agents "could hear from one car to the other" support any finding contrary to those set forth above.

The credibility of Brown's testimony is open to further question in view of the following facts. Brown initially refused to come to New York to testify at the trial at the request of the Government, stating: "I would not come to New York because I had been there as much as I ever cared to go."[8] Notwithstanding this reluctance, he did come to New York to testify before this Court. Although Brown claimed that the defendants told him nothing about the hearing, he explained that he was ultimately persuaded to appear because he was told "I should come as an American citizen and tell the truth." The defendants did, however, pay Brown's plane fare, hotel bills, meals and his

[8] P. 47, transcript of July 18, 1967.

daily earnings which he claimed to be $50 per day as a self-employed insurance salesman for his 4-day stay in New York.

The unreliable nature of the testimony of the witnesses Kennington and Brown is in sharp contrast to the clear and unequivocal testimony of Agents Kiere, Benjamin, Matuozzi and Selvaggi, all of whom are law enforcement officers of long experience and standing. Upon the Court's assessment of the entire testimony, it credits the testimony of the agents and rejects that of Kennington and Brown.

CONCLUSIONS OF LAW

1. Pursuant to the mandates of the United States Court of Appeals, dated May 29 and June 14, 1967, this Court has held hearings on the issues set forth therein. Defendants were afforded a full and complete opportunity to present their evidence, with the way prepared by four conferences before and during the hearings, defendants' burden lightened by numerous adjournments, their rights protected by the Government's production of twelve requested witnesses—in sum, a record spanning two months, comprising 813 pages of transcript.

2. The Court has analyzed the contents of the conversations relating to the defendants Frank Dioguardi overheard by the Casa Maria-Dorey surveillance (GX 1-12) and determined that they had no relevance to any of the evidence introduced at the trial or the conviction of any of the defendants.

3. Since nothing was overheard on the electronic device in the rented Avis automobile, it had no relevance to any of the evidence introduced at the trial or to the conviction of any of the defendants. The mere fact that an unsuccessful installation was made is not determinative.

4. The written statements of Oscar Kennington and Charles Brown prepared by defendants' investigator John G. (Steve) Broady prior to the hearings were not given any independent probative value apart from the witnesses' sworn testimony at the post-trial hearing. *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 933 (2d Cir. 1957). The decision of the Second Circuit in *United States* v. *Desisto*, 329 F. 2d 929 (1964) does not require a contrary conclusion.

5. The defendants have failed to carry their burden of showing that any governmental personnel engaged in any other electronic eavesdropping related to this case. The defendants have failed to demonstrate that any of the evidence used against them at the trial was tainted by any invasion of their constitutional rights. *Nardone* v. *United States*, 308 U. S. 338, 341-42 (1939); *United States* v. *Morin*, Docket No. 29786 (2d Cir., June 1, 1967) slip opinion p. 2392; *Addison* v. *United States*, 317 F. 2d 808, 812 (5th Cir. 1963), *cert. denied*, 376 U. S. 905 (1964); *United States* v. *Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1952); *United States* v. *Goldstein*, 120 F. 2d 485, 488 (2d Cir. 1942), *aff'd*, 316 U. S. 114 (1942).

Both the Second Circuit and the Supreme Court ruled in *Lawn* v. *United States*, 355 U. S. 339 (1958), 232 F. 2d 589, 594 (2d Cir. 1956), aff'g 116 F. R. D. 268 (S. D. N. Y. 1954) (where there had been an admitted invasion of the defendant's rights by way of violating the privilege against self-incrimination, which resulted in dismissal of a first indictment) that hearings were not necessary and that the affidavits of various government officials were of sufficient solidity to permit a ruling that the evidence actually used against the defendant was untained.

6. There was no relation between the Government's use of electronic equipment as described in findings of fact 1 through 19 and the trial and conviction of any of the defendants. Other than the incidents referred to therein, there was no electronic eavesdropping of any kind, by any member of any governmental agency which in any way related to these defendants.

7. The defendants have established no valid reason for a continuance of the hearings before this Court.

Dated: New York, N. Y.
August 30, 1967.

EDMUND L. PALMIERI
U.S.D.J.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October, one thousand nine hundred and sixty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERMAN CONDER,

Defendant,

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

It is further ordered, adjudged and decreed that the motion to inspect tape recordings and for other and further relief be and it hereby is denied.

A. DANIEL FUSARI
Clerk

APPENDIX D

Relevant Statutes

Title 21 United States Code:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is

summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such nartotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

F.R.C.P. RULE 28(b)

> "(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct."